No. 14,364

IN THE

United States Court of Appeals

For the Ninth Circuit

ADRIAN GUERRERO,
Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP CO.,
Appellee.

Appellee's Petition for Rehearing

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No. 14364

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Appellee.

Appellee's Petition for Rehearing

To: The Honorable Albert Lee Stephens, Honorable James Alger Fee, Circuit Judges, and Honorable John Wiig, United States District Judge and pro tempore, Circuit Judge:

The appellee respectfully petitions this Honorable Court for a rehearing upon the grounds and each thereof hereinafter stated immediately following the "Statement of the Pleadings and Facts in re Jurisdiction."[1]

PRELIMINARY STATEMENT

Rule 23 provides that a petition for rehearing may be presented within thirty days after judgment. Judgment was

1. Pertinent portions of all statutes and rules referred to in the body of the petition, and pertinent dictionary definitions, will be quoted in the petition *or* printed in the Appendix.

rendered on April 15, 1955. This petition is presented and filed within thirty days of said date. The rule also requires that the petition briefly and *distinctly* state its grounds, and be supported by a certificate of counsel that in his judgment it is well founded and that it is not interposed for delay.

The undersigned hereby certifies that in his judgment the petition for rehearing is well founded and that it is not interposed for delay.

The mandatory requirement of Rule 23 that a Petition for Rehearing "*distinctly* state its grounds" places counsel for the petitioning party in a difficult position.

A petition for rehearing is not and cannot be a paradoxical dissertation which in one part attempts to praise the form and substance of the judgment and in another part states a diametrically opposite contention.

The sole reason for filing a petition for rehearing is to convince the Judges who rendered the judgment complained of that they have committed serious and substantial error to the extent that a miscarriage of justice will be the result if the petition for rehearing is denied.

Consequently appellee-petitioner's counsel respectfully requests the Court to be patient and tolerant in spite of the fact that the petition will, of necessity, criticize what the Court has done, how it has done it and what it has omitted to do.

The rule promulgated by this Court requires freedom from confusion, absence of dimness, obscurity or vagueness in the admonition that the petition shall *distinctly* state its grounds. This requirement of the rule entitles counsel for the appellee-petitioner, in the performance of his duty to cause the petition to distinctly state its grounds, to assume that the Judges will read and consider it in a dis-

passionate attitude and will not be inclined to engender any resentment against the appellee-petitioner or its counsel merely because the petition follows the mandate of the rule.

STATEMENT OF THE PLEADINGS AND FACTS IN RE JURISDICTION

The first paragraph of the complaint avers that the defendant was and is a corporation organized and existing under and by virtue of the laws of the state of New Jersey. The second paragraph avers that plaintiff is a seaman and that his action for damages for personal injuries is premised upon the Jones Act, with a claim of jurisdiction predicated upon said statute. (Tr. Rec. page 2, l. 15 to p. 3, l. 1.)

That part of the Jones Act which is relevant to a case involving personal injury reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * * Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.)

The first cause of action is therefore "an action for damages at law". This Court has held that with respect to an action at law premised upon the Jones Act diversity of citizenship is not required. (*Van Camp Sea Food Co. v. Nordyke*, 140 F. 2d 902.)

A serious question of jurisdiction arises with reference to the second cause of action. This is based upon a claim for

"maintenance and cure." (Tr. Rec. p. 4, ll. 12-18.) There is no averment of diversity of citizenship between the plaintiff and the defendant.

In *Modin v. Matson Navigation Co.,* 128 F.2d 194, this Court held:

> "Thus Count 2 stated or attempted to state a claim for maintenance. * * * an action at law upon such a claim may be brought in a State court; or, if diverse citizenship exists and the claim is for more than $3,000 it may be brought in a District Court of the United States. * * * We conclude that Count 2 did not state a claim upon which the District Court, sitting as a law court, could grant relief. If the District Court could grant relief upon the claims stated or attempted to be stated in Count 2 it could do so only in admiralty."

There is nothing in the record on appeal now on file which shows that the plaintiff, at the time he commenced his action on the law side of the United States District Court, Southern District of New York was *not* a citizen of the State of New Jersey. Under these circumstances there could not have been any issue of fact submitted to a jury with reference to the second cause of action.

The jurisdiction of this Court with reference to the claim for maintenance and cure is derivative. If the United States District Court where the suit was instituted was without jurisdiction, on the law side, this Court is without appellate jurisdiction in reference to that claim.

The appeal from the judgment on the second cause of action should therefore be dismissed for lack of jurisdiction.

All of the decisions hold that it is the duty of every federal court, *sua sponte,* to question and investigate its own jurisdiction. Jurisdiction cannot be conferred by consent, silence or waiver. The second cause of action was within the jurisdiction of the United States District Court on

its *admiralty* side, but appellant would not be entitled to a trial by jury.

The opinion of this Court raises a very serious question with respect to its jurisdiction. On page 9 of the printed Opinion the Court (with reference to Rule 3(d)(2) of Rules of the United States District Court for the Southern District of California) as to summary judgments, states as follows: "The judges of the district court here concerned have acted, *assumedly* under" the authority of Rule 83, Federal Rules of Civil Procedure, which provides that each District Court may "* * * from time to time make and amend rules governing the practice not inconsistent with these rules. * * *." (Emphasis added.)

This Court must have entertained a serious doubt with reference to the power of the Judges of the United States District Court, Southern District of California, to promulgate said Rule 3(d)(2) with reference to the procedure to be followed on a motion for a summary judgment. Otherwise it would not have used the words "*assumedly* under such power". Appellee infers that this Court may be of the opinion that the provisions of the local rule with reference to findings of fact are inconsistent with the provisions of Rule 52, Rules of Civil Procedure by reason of the rule expressed in the maxim *expressio unius est exclusio alterius.*

Rule 52, F.R.C.P. provides in part as follows:

> "In all actions tried upon the *facts* without a jury or with an advisory jury, the court *shall* find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *"

If the local rule referred to, *supra,* is inconsistent with Rule 52 then local rule 3(d)(2) is void.

There can be no dispute about the proposition that a United States District Court may effectively decide a

motion for a summary judgment by an *oral* order made in open court and *entered in* the Civil Docket.

The transcript of record, pages 65-67, shows that the Clerk of the Trial Court kept a civil docket in accordance with the requirements of Rule 79 F.R.C.P. The notations with respect to the motion for summary judgment show the substance of the order.

The transcript of record, which is the only *proper* part of the record on appeal in this court shows the following: On March 8, 1954 the clerk entered an order granting the motion of defendant for summary judgment. (Tr. Rec. p. 67.) If findings of fact are not permitted or required, then the time to appeal commenced running on March 8, 1954. The notice of appeal was not filed until April 19, 1954. (Tr. Rec. p. 56.)

Rule 54 F.R.C.P. provides that "judgment" as used in the rules includes *any order from which an appeal lies.* There is no question about the proposition that the order orally announced by the trial court on March 8, 1954, and entered in the civil docket on that date was a "judgment" as that word is used in the Rules of Civil Procedure. It is axiomatic that there can be but one final judgment in any case.

If, in the case at bar, there are two "judgments," one consisting of a *summary* judgment rendered *forthwith* by the Trial Court from the bench and entered in the civil docket on March 8, 1954 and another in the form of findings of fact, conclusions of law and formal written judgment entered on March 26, 1954, an appeal from the second "judgment" would be ineffective to set aside the first "judgment" entered in the civil docket on March 8, 1954.

Appellant has not appealed from the "order" granting the motion for summary judgment and entered in the civil docket on March 8, 1954 because his notice of appeal, which

is jurisdictional, was not filed until April 19, 1954, more than thirty days after the *forthwith* rendition of summary judgment from the bench on March 8, 1954.

Rule 56(c) F.R.C.P. provides, in part:

> "* * * The (summary) judgment sought *shall* be rendered *forthwith* if the pleadings, depositions and admissions on file, together with the affidavits, *if any,* show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *" (Emphasis added.)

If this mandatory requirement that the summary judgment be rendered *forthwith* means that the statutory power of a trial court must be exercised by means of the entry of an order for summary judgment in the civil docket, then the instant the trial judge orally announced the order and it was entered by the Clerk in the civil docket, the Trial Court would have no jurisdiction to do anything more with reference to the rendition of a summary judgment. A final judicial act had occurred on March 8, 1954. If this is the case, the mere fact that the Trial Court directed that findings of fact, conclusions of law and *formal* written judgment be prepared would be nugatory and the time to appeal from the summary judgment thus rendered *forthwith* would commence to run from the entry of the order in the civil docket.

The rules of the United States District Court for the Southern District of California with reference to motions for summary judgment either *were* or were *not* promulgated pursuant to Rule 83, Rules of Civil Procedure. There is no opportunity to vacillate on that proposition. This court casts doubt upon the authority of the judges of the United States District Court, Southern District of California. It says: "The judges of the District Court here concerned have acted, *assumedly* under such power, by adopting Rule 3(d)(2) (of Rules of the United States District Court for the Southern

District of California) as to summary judgments, * * *." (Printed Opinion, p. 9.)

Appellee *contended* in its brief: "Pursuant to this (Rule 83, F.R.C.P.) authority the judges of the United States District Court for the Southern District of California have promulgated * * * a special rule with reference to motions for summary judgment." (Brief for Appellee, p. 22.) It is respectfully submitted that if this Court entertains the view that the judges of the United States District Court, Southern District of California, were without lawful power to promulgate said local rules, the Court should so state in concise and distinct language. This is an important element in the instant case. It is also of general importance because the rule is in constant application.

If the provisions of the "local rule" with reference to "findings of fact" are invalid for the reason that they may be deemed inconsistent with the provisions of Rule 52, Rules of Civil Procedure, on the theory that under no circumstances may a trial court make findings of fact unless it is rendering a decision with reference to genuine issues of material fact submitted to it, without a jury, then the local rule with reference to "findings of fact" would obviously be nugatory and the act of a trial court in making "findings of fact" on a motion for a summary judgment would be *functus officio*. Under such circumstances the notice of appeal filed in the instant case would be too late to confer any appellate jurisdiction upon this court.

> "* * * The clerk shall keep a book known as 'civil docket' * * *, and shall enter therein each civil action to which these rules are made applicable. * * * all * * * orders * * * shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the * * * substance of each order * * * of the court * * *. The notation of an order or

judgment shall show the date the notation is made." (Rule 79(a) Rules of Civil Procedure.)

The "Supplemental Transcript of Record" shows that on March 8, 1954 the trial court, from the bench, *ruled* as follows:

"* * *, THE *MOTION* FOR SUMMARY JUDGMENT *IS* GRANTED."

The Transcript of Record, filed May 21, 1954 in this court, shows on its face that the clerk of the court below entered a notation in the Civil Docket as follows: *"ent * * ord grntg mot of deft for summy jdgmt,* counsel for deft to prepare & submit findgs of fact, concls of law & judgmt accordingly" (Tr. Rec. p. 67.) If the trial court was without power to make "Findings of Fact" etc., its statement "now you can prepare the findings and judgment" would likewise be void. The Transcript of Record would, under such circumstances, show the order granting the motion for summary judgment and a notation of the substance thereof in the Civil Docket on March 8, 1954. The balance of the notation would be surplusage.

GROUNDS OF PETITION FOR REHEARING

The grounds of appellee's Petition for Rehearing are briefly and distinctly stated as follows:

1. Promptly after the filing of his notice of appeal, the appellant served upon appellee and filed *his* designation of the portions of the record to be contained in the record on appeal. Upon receipt and examination of the appellant's designation of the portion of the record to be contained in the record on appeal, appellee served and filed a designation of additional portions of the record consisting solely of the minutes kept by the Clerk of the Trial Court.

Appellant having intentionally restricted the portions of the record to be contained in the record on appeal to the

equivalent of a judgment roll, appellee was content to permit appellant to so proceed upon what has turned out to be an erroneous assumption that this court would not consider any matter or thing which was not a part of the record on appeal containing the portions of the record so as aforesaid specifically described in appellant's and appellee's designations. When completed in strict accordance with appellant's and appellee's designations the record on appeal was certified by the Clerk of the District Court, under his hand and the seal of the court, and was thereupon transmitted by said Clerk to the Clerk of this Court and was filed herein on May 21, 1954.

The Clerk of this Court, in accordance with Rule 17(3) distributed a copy of the said "Transcript of Record" to the undersigned as counsel of record for the appellee in this Court. With the record in this state the opening "Brief for Appellant" was filed and served on July 2, 1954. The "Brief for Appellee" was filed and served July 22, 1954. Ignoring Rule 18(4), rules of this Court, appellant served and filed "Appellant's Closing Brief" on February 7, 1955, more than six months after the receipt by appellant of a copy of the "Brief for Appellee".

On February 7, *1955* a document purporting to be a reporter's transcript of oral proceedings on February 15, 1954, March 1, 1954 and March 8, 1954 was filed in the office of the Clerk of the Trial Court. On February 7, 1955, the original and three copies of said reporter's transcript of oral proceedings, without being certified by the Clerk of the District Court, were transmitted to the Clerk of this Court. The Clerk of this Court pasted on the outside covers of the original and the three copies of said reporter's transcript, which was *not* a part of the *original* records of the District Court, a different cover bearing the title of this Court; the number of the cause in this Court and thereby made the

same an *ostensibly* valid part of the record on appeal for use by this Court in its consideration of the appeal and the rendition of its judgment.

No copy of this document which the Clerk of this Court described on the face of the new cover as a "Supplemental Transcript of Record" was distributed by the Clerk of this Court to counsel of record for the appellee.

All of the foregoing, with reference to the "Supplemental Transcript of Record" took place without any action on the part of this Court, the District Court, or anybody else excepting the collaborated effort of counsel for appellant, the Chief Deputy Clerk of the Trial Court and the Clerk of this Court. Appellee did not stipulate that it be prepared or filed as a supplemental record on appeal and was not notified until the judgment was rendered and filed on April 15, 1955 that this Court intended to or would use said "Supplemental Transcript of Record" as a material basis of reversal. The action of the Court in innocently using said "Supplemental Transcript of Record" was prejudicially erroneous and in direct conflict with the due process of law clause, Fifth Amendment, Constitution of the United States.

2. A release is not a maritime contract. Therefore it is not subject to the substantive or adjective admiralty and maritime law. The validity of a release is to be determined by the substantive law of the state where it was executed. If this court has assumed as one of the bases of its judgment that the release executed by appellant is a maritime contract, such assumption is erroneous.

3. This Court has inadvertently overlooked, to the benefit of appellant and the detriment of appellee, the Act of June 19, 1934, Chapter 651, §§ 1, 2 (48 Stat. 1064), enacted by the Congress, pursuant to which the Rules of Civil Procedure were promulgated by the Supreme Court of the United States; the following Rules of Civil Procedure: Rule 1; Rule 2; Rule 6(d); Rule 7(b)(1); Rule 9(g); Rule 12

(b)(6); Rule 12(c); Rule 16(1), (2), (3), (6); Rule 17(b), (c); Rule 26(a), (d)(2), (e); Rule 28(a); Rule 32(c)(1), (d); Rule 43(a), (e); Rule 46; Rule 56(b); Rule 60(a), (b)(1); Rule 61; Rule 75(a), (d), (g), (h), (i), (o); and the following Rules of the United States Court of Appeals, for the Ninth Circuit: Rule 17(3); Rule 18(2)(c); the first two sentences in Rule 18(d); and the prior decisions of this and other United States Courts of Appeal which have established clear precedent amounting to *stare decisis* with respect to the absolute requirement that the rules be obeyed by all appellants; and the proposition that a United States Court of Appeals will not consider, as ground for reversal, any claim of error unless it affirmatively appears on the face of the record, was preserved by proper objection in the trial court, and is set forth in "a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged" and that "when the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found", *and* also the provision of the Fifth Amendment to the Constitution of the United States that no person shall be deprived of his property without due process of law.

4. The term "Burden of proof" is incontrovertibly inapplicable to a motion for a summary judgment pursuant to Rule 56 Rules of Civil Procedure. There cannot be any issue of fact involved in any part of such motion; and therefore the term "burden of proof" is not involved in the slightest degree. The only issue involved in a motion for a summary judgment is an issue of law. Upon the trial of an issue of law the use of the term "burden of *proof*" is conclusively inaccurate. The issue of law involved in a

proceeding pursuant to which a motion for a summary judgment is presented in writing and orally to a trial court, pursuant to Rule 56, Rules of Civil Procedure, is whether there is a genuine issue of material fact relevant to an issue formally raised by the pleadings and which will control the ultimate right of either the plaintiff or the defendant to prevail.

The judgment rendered by this court on April 15, 1955 shows on its face that said judgment is premised upon an erroneous conception of the basic principles and purposes of the summary judgment procedural (or adjective) and substantive law. No burden of *proof* was imposed upon the appellee to show the validity of the release in a proceeding pursuant to Rule 56. It is paradoxical to say that if the "evidence" submitted to a trial court shows that there is a genuine issue of material fact relevant to a controlling factor in the case, the motion for a summary judgment must be denied; and in the next sentence to say that in order to prevail upon such a motion the moving party must prove conclusively, by the introduction of affirmative evidence for that purpose, the non-existence of every conceivable material fact which might entitle the adverse party to submit the case to a jury for decision.

Formal issues raised by the pleadings are disregarded excepting for the single purpose of ascertaining what issues of material fact are raised thereby. The trial court determines this proposition, as a matter of law and not of fact; and the moving party and the opposing party are then *required* to cooperate completely, honestly and in good faith with the Trial Court to the end that all relevant and competent evidence of which either of the parties has any knowledge is fully disclosed for the purpose of enabling the trial court to determine, as a matter of law, from an inspection and examination of all of such evidence, oral or docu-

mentary, contradictory or corroborative, whether there is or is not a genuine issue of material fact relevant to any *controlling* issue raised by the pleadings.

5. The judgment of this court is in conflict with plainly applicable decisions of the United States Supreme Court, decisions of this Court, decisions of United States Courts of Appeal in other circuits; the Federal Rules of Civil Procedure; the Rules on Appeal promulgated by this Court; and the due process of law clause of the Fifth Amendment, Constitution of the United States.

6. The court-created presumptions and the court-created "burden of proof" rule premised thereon, as enunciated by the United States Supreme Court, United States Courts of Appeal, and United States District Courts over the course of many years last past with reference to a contract of release made and executed by and between a person whose occupational status is that of "seaman" and another person who happened, at the time of the accrual of a claim for damages for personal injuries sustained by such "seaman" to be the employer of such seaman, are and each thereof is arbitrarily discriminatory for the reason that there is no rational connection between the mere fact that any man makes his living as a seaman and the presumptions, which, collectively considered, result in the classification of all such "seamen" in a fictitious category of persons who by reason of old age, disease, weakness of mind, or other cause, are unable, unassisted, properly to manage and take care of themselves or their property, and by reason thereof are likely to be deceived or imposed upon by artful or designing persons and the classification of all employers and ex-employers of men who make their living as seamen in a category of artful or designing persons.

These court-made presumptions and the "burden of proof" rule premised thereon are and each thereof is in direct conflict with the due process of law clause, Fifth

Amendment, Constitution of the United States. Said court-created presumptions, so an inspection of the various decisions creating or recognizing them will reveal, are the result of *obiter dictum*. There is no concept of judicial notice which will support them.

With particular reference to the various decisions of courts of appellate jurisdiction where this fallacy has been created or accepted, the Courts inadvertently overlooked the fundamental proposition that they are not trial Courts and are not permitted to make findings of fact with reference to the capacity or incapacity of any party involved in an action. All an appellate Court is lawfully authorized to do is to rule whether the evidence upon which a finding of competency or incompetency has been made is legally sufficient to sustain the finding of a trial Court or jury in the face of a contention on appeal that the evidence is insufficient, as a matter of law, to sustain such finding. Whether or not any seaman is legally competent to execute a presumptively valid contract of release is not a question of law. It is a simple question of fact.

7. As a premise for this ground appellee assumes that this Court in the statements which it made in the Opinion, made them with the intention that they stated rules of law directly applicable to the parties to this particular action and the questions of law involved on this appeal. The Court states: "No one disputes the premise that seamen are under the *protection* of the Courts, * * *". Therefore the Court, at the outset of the Opinion, placed itself in the status of preserving, defending, sheltering and looking out for the security of the appellant. "Protection" means the preservation and defense of persons *non sui juris* and persons of mental incapacity. (73 C.J.S. 263.) The word "protect" carries the idea of preserving safety and making absolutely

safe and is defined as meaning to guard, shield, preserve; to preserve in safety; to preserve intact, to keep safe, take care of, to cover or shield from danger, harm, damage, trespass, exposure, insult, temptation or the like, or from that which would injure, destroy or detrimentally affect, to cover, shield, or defend from injury, harm, or damage of any kind; to defend. (73 C.J.S. 262.)

If this court intentionally meant to say that the appellant in the case at bar is under the protection of this Court, just what is it protecting the "seaman" from? Implicit in the noun "protection" is the premise that the Court in the instant case is charged with the duty of taking affirmative steps in order to take care of, guard, shield, and preserve the seaman *against* the *appellee* as the *common adversary* of *the Court and the appellant.* In all probability the use of this language was an unfortunate inadvertence on the part of the Court. On the other hand if the language was deliberately and intentionally chosen and used it demonstrates that the constitutional, statutory and common law rights of the appellee have been ignored. One of the essential requirements of due process of law, procedural and substantive, is that the Court be absolutely impartial in all respects as between the litigants. In the standard dictionaries "defend" is referred to as a synonym of "protect".

> "Defend. In a broad sense, to protect, to secure against attack. In a narrower sense, to contest and endeavor to defeat a claim or demand against one in a Court of justice: to contest a suit. Used in the broad sense, the word presupposes or indicates a preceding attack and includes the power to maintain affirmatively the rights of a person; * * *" (26 C.J.S. 671.)

"Defend" is also defined in *Powell v. U. S.,* 60 F. Supp. 433, 439 as follows:

"To protect or shield from attack or violence; guard against threatened or offered harm; to make a stand for or uphold by force or argument; maintain against attack, encroachment or opposition; maintain; vindicate, as to defend the course of administration."

8. The Court has impliedly amended and added to the specification of errors set forth on page 6 of the opening "Brief for Appellant" under the designation of "Assignment of Errors" and the summary of argument set forth on page 7 of said brief under the designation of "Outline of Argument" without giving to the appellee the slightest warning of its intention to do so or allowing the appellee any opportunity whatever to express its contentions with reference thereto either in the form of a written brief or upon oral argument; and in spite of the fact that the record on appeal shows conclusively that said points of alleged error on the part of the Trial Court were not preserved in the Trial Court by any objection which would justify this Court in ruling that the Trial Court committed prejudicial error.

9. The Court has inadvertently overlooked substantial contentions asserted by the appellee in the written "Brief for Appellee" in support of the summary judgment rendered by the Trial Court; and appellee respectfully contends that it is entitled, as a matter of absolute right, to have all such contentions decided in favor of or against appellee in direct, concise and plain language.

10. The Trial Court held, as a matter of law, that there was no genuine issue of material fact relevant to the appellee's contention that the appellant ratified the contract of release by retaining the consideration and failing to return or offer to return any part or portion of the consideration. This Court has erroneously decided these questions and

the manner in which the Court has "disposed" of them is a denial of the procedural and substantive rights of the appellee pursuant to the due process of law clause, Fifth Amendment, Constitution of the United States.

ARGUMENT IN SUPPORT OF PETITION

Ground One

On April 27, 1954, appellant served upon the appellee and filed with the District Court, a document entitled "Praecipe", but which appellee construed as "a designation of the portion of the records, proceedings and evidence to be contained in the record on appeal", in accordance with Rule 75(a), Rules of Civil Procedure. Said document designated only the following: 1) The complaint. 2) The answer. 3) Plaintiff's demand for jury trial. 4) Notice of motion and motion for summary judgment. 5) Proposed findings of fact and conclusions of law. 6) Proposed judgment. 7) Findings of fact and conclusions of law. 8) Judgment. 9) Notice of appeal and affidavit of mailing. 10) Assignment of errors and affidavit of mailing. 11) Petition and order allowing appeal without furnishing bond or prepayment of costs and points and authorities. 12) Copy of the (civil) docket. 13) Praecipe (sic), and affidavit of mailing. (Tr. Rec. p. 63.)

Having thus been notified by the appellant that he intended to prosecute his appeal from the summary judgment upon the equivalent of what is commonly known as a "judgment roll", the appellee, being satisfied to permit the appellant to do so with the addition thereto of the minutes kept by the clerk of the Trial Court "from the filing of said action to and including the entry of summary judgment", served and filed a designation of said additional portion of the record to be included in the "Record on Appeal". Appel-

lee's designation was served and filed on May 4, 1954. (Tr. Rec. p. 64.)

The Clerk of the District Court under his hand and the seal of the Court, pursuant to Rule 75(g) Rules of Civil Procedure, transmitted to the United States Court of Appeals, 9th Circuit, "a true copy of the matter designated by the parties". This document was entitled, on the cover thereof, "TRANSCRIPT OF RECORD". It was filed in the office of the Clerk of this court on May 21, 1954. The opening "Brief of Appellant" was filed and served on July 2, 1954. The "Brief for Appellee" was filed and served July 22, 1954. In utter disregard of subdivision 4, Rule 18, United States Court of Appeals, 9th Circuit, appellant served and filed "Appellant's Closing Brief" on February 7, 1955, six months and fifteen days after the receipt of copies of the "Brief for Appellee".

On February 7, *1955,* there was filed in the office of the Clerk of the United States District Court, Southern District, at a time when said court was without jurisdiction because of the Notice of Appeal which was filed in said court on April 19, 1954, the original and copies of a document entitled on its cover as follows: "Reporter's Transcript of Proceedings".

These documents were entitled on their covers as follows: "In the United States District Court, Southern District of California, Central Division". The original of the document and the copies, on page 12 thereof, contained a "Certificate" by S. J. Trainor, "Official Reporter". Said certificate is dated at Los Angeles, California "this 7th day of February, 1955." (See blue cover on original and copies amongst the files of this court; and page 12 of the contents within the covers thereof.) The original *blue* cover, bears the following endorsement: "Filed, Feb. 7—1955." This filing stamp

relates to the date upon which the documents were filed in the office of the Clerk of the District Court.

A Deputy Clerk of the District Court wrote a letter to Paul P. O'Brien, Esq., Clerk of this Court, on February 7, 1955, stating as follows:

> "I am enclosing herewith four copies of Reporter's Transcript of Proceedings on February 15, March 1 and 8, 1954 which I presume is intended as a supplement to the record on appeal. I am also forwarding a copy to each of counsel." (See file of *this* Court.)

On February 7, 1955 the undersigned, Lasher B. Gallagher, was the sole attorney of record for the appellee in this court. The court will notice that the document entitled "Supplemental Transcript of Record" now amongst the files of this court, is not "upon paper 8 inches by 10½ inches". The clerk of this Court did not prepare said record and did not distribute any copy of said "Supplemental Transcript of Record" to counsel for the appellee. There is no affidavit of mailing attached to the original or any of the copies of the "Reporter's Transcript of Proceedings" mailed by Mr. Hocke to Mr. O'Brien. There is no admission of the receipt of a copy thereof by counsel for the appellee attached to or endorsed upon the original or any of the copies of said "Reporter's Transcript of Proceedings". In fact there is nothing whatever amongst the records and files of this court to show that counsel of record for the appellee ever received any copy of said "Reporter's Transcript of Proceedings". In this connection the attention of the court is directed to the fact that pages 1, 5 and 7 of said "Reporter's Transcript of Proceedings", under the heading of "Appearances" referred to the fact that Robert Sikes, Esq., 1256 West First Street, Los Angeles, California, appeared as counsel for the defendant, American Hawaiian

Steamship Co. There is nothing in the record which shows that on February 7, 1955 said Robert Sikes, Esq. maintained an office at 1256 West First Street, Los Angeles, California. In fact he did not. 1256 West First Street, Los Angeles, California, was the address of the undersigned, attorney of record for the appellee in this court.

Neither the original of the document now on file in the office of the Clerk of this Court, nor any of the copies thereof, contains the seal of the United States District Court and said document was not "certified by the clerk as a part of the record on appeal". By reason of the fact that the document was not filed in the office of the Clerk of the District Court until February 7, 1955, it is obvious that it was not and could not be considered as a part of the "original papers" on file in the office of the Clerk of the District Court. It does not contain *testimony*. Therefore it is not "a transcript of the testimony" referred to in Rule 75(o), Rules of Civil Procedure.

The original and three copies of the "Reporter's Transcript of Proceedings" were received by Paul P. O'Brien, Esq., Clerk of this Court, on February 8, 1955. He placed or caused to be placed thereon, an additional white cover, bearing the title of this Court, the title of the cause as docketed in this Court and the number assigned to the case amongst the files of this Court. Mr. O'Brien did not, however, transmit to the undersigned any copy thereof or give him any notice, either oral or in writing, of the fact that he had filed or caused this document to be filed in his office on February 8, 1955 or at any time thereafter up to and including the date when the opinion of this court was filed and a copy thereof was transmitted to the undersigned.

Said document was not prepared nor did it find its way into the files of the case in the office of the Clerk of this

Court, pursuant to the provisions of Rule 75(h), Rules of Civil Procedure, or any part or portion thereof.

Appellant at no time claimed that anything material to either party was omitted from the record on appeal "by error or accident or is misstated therein". There was no stipulation pursuant to which this "Reporter's Transcript of Proceedings" was filed. Neither the District Court nor this Court "on a proper suggestion or of its own initiative" directed that any "supplemental record" be certified and transmitted by the Clerk of the District Court.

Having restricted its argument in the "Brief for Appellee" to four points, which appellee believed were sufficient to result in an affirmance, rather than a reversal, of the judgment appealed from, but not willing to be placed in a position where it could be rightly or wrongly accused of lulling the appellant into a sense of false security, stated as follows:

> "In the appellant's designation of the portion of the record to be contained in the record on appeal, he failed to designate for inclusion any of 'the testimony and evidence given at the trial in said action' specified in the written notice of motion as one of the bases of the motion or any part of the oral proceedings at the time the matter was presented to the trial judge on March 8, 1954." (Brief for Appellee, page 19.)

The foregoing comments of appellee were delivered, *in writing,* to the appellant on *July 22, 1954,* the date the "Brief for Appellee" was filed and served.

Rule 75(h) provides that "If any *difference* arises as to whether the record truly discloses what occurred in the District Court, the *difference* shall be submitted to and settled by that court and the record made to conform to the truth." (Emphasis added.) This provision of the rule does

not relate to matter which has been *omitted* from the record on appeal by *error or accident* or is *misstated* therein.

What appellee stated in its written brief did not give rise to "any *difference* * * * as to *whether* the record truly discloses what occurred in the District Court". The comment in appellee's brief was set forth therein for the purpose of making certain that this Court's specific attention would be called to the fact that the "Transcript of Record" which constituted the "Record on Appeal" contained nothing but the equivalent of what we all know as "a judgment roll".

There is nothing whatever in the "Transcript of Record" which affirmatively shows that anything was omitted therefrom by error or accident. It contains a copy of everything called for in the appellant's "praecipe". It must be presumed that the appellant's written "Designation of the portions of the record" to be contained in the record on appeal was the result of an intention on his part to prosecute his appeal on the equivalent of "a judgment roll".

Assuming that Rule 60(b), Rules of Civil Procedure, is available and applicable in a United States Court of Appeals, the appellant made no motion for "relief".

If this court is empowered to hear and decide a motion pursuant to Rule 60(b), Rules of Civil Procedure, the burden would have been imposed upon the appellant to show that any omission from the record was the result of "mistake, inadvertence, surprise or inexcusable neglect."

If the appellant had made a motion for an order pursuant to which, if granted, the oral proceedings contained in the abortive "Supplemental Transcript of Record" would have become a valid part of the record on appeal, appellee would have requested this court, if it were inclined to grant such motion, that it do so upon terms consisting of an order requiring the appellant to also procure, to be included in

any supplemental transcript of record, a reporter's transcript of the oral proceedings on January 25, 1954; a full and complete copy of the order of the District Court directing counsel to file simultaneous briefs on the question of the release; a copy of that part of all depositions containing material testimony relevant to the validity of the release; a copy of all exhibits; and a copy of the "Transcript of the Evidence" referred to by the trial court in the so-called "Supplement Transcript of Record".

The use by this Honorable Court of the abortive "Supplemental Transcript of Record" has reacted to the definite prejudice of appellee. A court exercising exclusively appellate jurisdiction is required to base its consideration of the rights and liabilities of the respective parties upon a written record. Fundamental ideals of fairness, as well as the due process clause of the Fifth Amendment, require that each of the parties have notice of the contents of the written record which the court is authorized to use as a basis upon which to predicate its decision.

If appellee had known, before the filing of its written brief or before the oral argument, that this court intended to use and consider the document bearing the designation "Supplemental Transcript of Record", it could and would have contended as follows: The oral proceedings on February 15, 1954 were obviously conducted as part of a pretrial hearing pursuant to which the trial judge was authorized to procure a "simplification of the issues", "the possibility of obtaining admissions of fact and of documents which (would) avoid unnecessary proof" and "such other matters as may aid in the disposition of the action". (Rule 16, Rules of Civil Procedure); and that the proceedings on January 25, 1954, the subject of notations by the Clerk of the District Court in the "civil docket" (Transcript of

Record, p. 67, ll. 19-20) also related to a pretrial hearing; and if this Court intended to use and consider the oral proceedings on February 15, 1954 (which took place before the notice of motion and written motion for summary judgment were served and filed on February 23, 1954), that appellee would be entitled, as a matter of right, to an order directing and compelling the appellant to procure and cause to be filed in this court, as an additional part of the supplemental record on appeal, a reporter's transcript of the oral proceedings on January 25, 1954, together with a true and complete copy of the order made and entered by the trial court on January 25, 1954, directing counsel for the respective parties to simultaneously file briefs on the question of the validity of the release; and a copy of all briefs filed pursuant to such order. These matters might show that the appellant, in the trial court, expressly or impliedly consented to an announced intention of the trial court to use and consider its notes and recollection of the sworn testimony of the plaintiff and other witnesses; and the various depositions then on file, in determining whether there was any genuine issue of material fact relating to the validity of the release which would require the formal issues raised by the averments in the special defense of the defendant based upon the release to be submitted to a jury for decision. Appellee also could and would have argued that the conduct and affirmative statements of appellant's counsel, shown by the colloquy between appellant's counsel and the trial court, on February 15, 1954 and March 8, 1954, constituted a consent on the part of the appellant that the trial court might use and consider all of the above matters in determining whether there was or was not any genuine issue of material fact requiring the validity of the release to be submitted to a jury. Specifically, appellee would have argued that the

sole and only contention asserted by appellant's counsel when he was unambiguously informed with reference to the trial court's intended use and consideration of the above matters was that the question of the validity of the release was a question of fact for a jury. This objection meant no more than a contention that in *every* case, and therefore in the instant case, a person whose occupational status is that of seaman is entitled as a matter of absolute right, and regardless of the state of the available evidence, to have a jury arbitrarily decide the ultimate issue as to the validity of such release. Appellee could and would have argued that the appellant made no objection directed to any contention that the trial court in considering and deciding a motion for a summary judgment was restricted to the consideration of the pleadings, depositions, admissions on file, and affidavits; or that in the performance of the judicial function of determining whether there was or was not a genuine issue of material fact relevant to the validity of the release the trial court was not authorized to consider or base his ultimate ruling upon "the files and records of the case" or "a transcript of the evidence." These matters were specifically referred to by the trial court on February 15, 1954. ("Supplemental Transcript of Record", p. 3, ll. 2-3.) Appellee could and would have argued that after appellant's counsel had heard and understood the foregoing remarks of the trial court he acquiesced in the proposed procedure when he stated as follows: "I think it would *simplify* the matter to *dispose* of this *particular* item, and then if it is decided that it is a defense, why, we have saved the time of another two days' trial." ("Supplemental Transcript of Record", p. 4, ll. 10-13). The oral proceedings on February 15, 1954 terminated as follows:

"The Court: I think that is the way to dispose of it. I will continue the question of setting until March 1. By that time you can file your motion?

Mr. Sikes: Yes, your Honor.

The Court: All right." ("Supplemental Transcript of Record", p. 4, ll. 14-18.)

Appellee could have and would have argued that nobody, including seamen who happen to be litigants, can by their chosen counsel impliedly invite a trial court to do something in a particular way and complain about it, *after* it has been done in *that* manner without the slightest objection in the trial court, when the trial court has decided the issue of law against him.

If prior to the submission of the case for decision by this Court, the appellee had been given the slightest clue that the Court *intended* to do so, it also could and would have argued that it is not within the constitutional or statutory prerogatives of this court to set forth in its opinion objections which the appellant did not urge in the trial court or to amend (*nunc pro tunc*), the specifications of error contained in the appellant's opening brief or to supply additional specifications of error which the appellant had not thought of, did not argue, and which the appellee has had no opportunity whatever to answer. This, appellee could have argued, is a clear and indefensible deprivation of due process of law both from procedural and substantive standpoints.

Ground Two

The release was executed on August 26, 1949 in Los Angeles County, State of California. (Tr. Rec. p. 30, l. 15 to p. 31, l. 22.) It is conceded that an action to recover damages under the Jones Act or the General Maritime Law or to

recover wages or money expended for maintenance and care are clearly within the admiralty and maritime jurisdiction. The reason for this is that the torts involved are maritime, the wages due pursuant to shipping articles or oral contracts of employment are predicated upon maritime contracts; and the right to maintenance and cure arises out of the contractual relationship of employer and employee in matters directly connected with the ownership, maintenance and operation of a vessel upon navigable waters.

> "Though the maritime law regulates and enforces maritime contracts, it does not take cognizance of agreements, which, although they may be preliminary to maritime contracts and have direct reference to them are not in themselves maritime. Thus, a policy of maritime insurance is a maritime contract; but an agreement to make a particular policy has been held not to be a maritime contract; so that, if the *agreement* should be *violated* and the policy should not be made, *or, being made, should differ in important particulars from that agreed upon,* the admiralty would *not* have jurisdiction of a suit for the breach of contract, although it would entertain a suit on the policy actually made. *Nor would admiralty have jurisdiction to reform the policy, or to take cognizance of a mutual mistake.* So, too, the chartering of a ship is a maritime service and the charter party is a contract within the cognizance of the admiralty; but a mere undertaking to make a charter party, or to procure a person to make one, is not within the jurisdiction of the admiralty; it is not a maritime contract, and is not subject to the regulation of the maritime law. The usual occasions on which a court of admiralty will take jurisdiction of a non-maritime contract are when such contract is incidental to a maritime contract: if a contract is maritime in itself it carries all its incidentals with it and the latter, though non-maritime in themselves, will, unless separable, be heard and decided. But where the *principal*

> *subject-matter* of a contract belongs to the jurisdiction of *a court of common law or of equity,* the *whole* contract belongs there, and admiralty will not take jurisdiction, even though incidental matters connected with the contract might in themselves be cognizable in the admiralty. The distinction in many cases will, undoubtedly, seem shadowy; still, in a large class of cases, it will be readily perceived and its importance fully appreciated." (Benedict on Admiralty, Sixth Ed., Vol. 1, pp. 127 (§ 63)-129; emphasis added.)

A list of particular instances of maritime contracts is set forth in § 66, commencing at page 133 of the same volume of Benedict on Admiralty. A list of particular instances of non-maritime contracts is set forth in § 67, commencing at page 138 of the same volume.

In this latter list reference is made to the fact that this Court in *"The T. W. Lake" (Home Ins. Co. v. Merchants Transp. Co.),* 6 F.2d 372, held that an action for the recovery of money obtained on a maritime contract of insurance by mistake or fraud was *not* within the admiralty and maritime jurisdiction. Reference is also made to the fact that an action for *fraud or misrepresentation* in inducing the making of a charter party was held not within the admiralty and maritime jurisdiction in the case of *Gronvold v. Suryan,* 12 F. Supp. 429.

In *The T. W. Lake* (supra) this Honorable Court stated as follows:

> "Jurisdiction in admiralty in cases of contract depends upon the nature of the contract 'and is limited to contracts, claims, and services purely maritime and touching the rights and duties appertaining to commerce and navigation,' *Eclipse,* 135 U.S. 599, 608. A contract of marine insurance is a maritime contract, *Insurance Company v. Dunham,* 78 U.S. 1. But a contract to pro-

cure marine insurance is not enforcible in admiralty, *Marquardt v. French,* 53 Fed. 603. Nor is a contract by a carrier by water to procure insurance on goods received for transportation a maritime contract, *City of Clarksville,* 94 Fed. 201. In *Plummer v. Webb,* 4 Mass. 380, Judge Story said: 'In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime.' In *Williams v. Providence Washington Ins. Co.,* 56 Fed. 159, it was held that admiralty has *no jurisdiction* of an action to *reform a policy of marine insurance.* Said the court, 'The complaint is, in fact, an action for *false and fraudulent representations,* by which *the libellant was induced to accept the policy,* supposing that he was insured for the Sound, when he was not. Such an action is not upon the policy itself, but upon the negotiations leading to it.' Courts of admiralty cannot entertain an original bill or libel for specific performance, or to correct a mistake, or to grant relief against a fraud, *Andrews v. Essex Fire & Marine Ins. Co.,* Fed. Cas. No. 374. In *United Transp. & L. Co. v. New York & Baltimore T. Line,* 185 Fed. 386, it was held that admiralty has no jurisdiction over non-maritime transactions following the execution of maritime contracts. This was held in reference to a counter-claim for damages on account of excessive charges paid to the libellant by the respondent under a prior contract between them, which contract was alleged to be void and fraudulent for the reason that the respondent's general manager, who made it, was also an officer of the libellant and betrayed the trust imposed in him by the respondent. Said the court, 'The matter is not maritime. The fundamental question is whether the manager of the respondent corporation, induced by his interest in the libellant corporation, betrayed his trust, and this question is not maritime in its nature.' " (Emphasis added.)

In the *Gronvold* case Judge Neterer, for whom we all have profound respect, stated:

"The charter of a vessel is a maritime service, and such contract is cognizable in admiralty. BENEDICT on *Admiralty* (5th Ed.) vol. 1, sec. 62, p. 82; sec. 65, p. 88; *Torices v. Winged Racer,* Fed. Cas. No. 14,102, 39 Hunt, Mer. Mag. 458; *Osaka Shosen Kaisha v. Pacific Export Lumber Co.,* 260 U.S. 490, 1923 A.M.C. 55; *Arlyn Nelson* (D.C.) 243 Fed. 415.

"It is also fundamental that a contract maritime in itself carries involved incidentals with it, and unless separable, nonmaritime claims will be heard with the maritime. BENEDICT on *Admiralty* (5th Ed.), vol. 1, sec. 62, p. 83; *Rosenthal v. Louisiana* (C.C.) 37 Fed. 264; *Pulaski* (D.C.) 33 Fed. 383; *Evans v. New York & P. S. S. Co.* (D.C.) 145 Fed. 841; Id. (D.C.) 163 Fed. 405; *Keyser v. Blue Star S.S. Co.* (CCA) 91 Fed. 267; *Nash v. Bohlen* (D.C.) 167 Grf. 427; *Union Fish Co. v. Erickson* (CCA) 235 Fed. 385, affirmed 248 U.S. 308; *Thomas P. Beal* (D.C.) 1924 A.M.C. 640, 295 Fed. 877; *Ada* (CCA) 250 Fed. 194.

"Torts aboard a vessel on the high seas or navigable waters are of admiralty cognizance. BENEDICT on *Admiralty* (5th Ed.), vol. 1, sec. 127, p. 196; *Plymouth,* 70 U.S. 20; *Hamburg, etc. Gye* (CCA) 207 Fed. 247, certiorari denied 231 U.S. 755; *California-Atlantic S.S. Co. v. Central Door & Lumber Co.* (CCA) 206 Fed. 5; *Keator v. Rock Plaster Mfg. Co.* (D.C.) 256 Fed. 574.

"It is, however, fundamental that the exceptions relating to the matters of inducement of the libellant must be sustained, the litigant being bound by the recitals in the charter party, all matters agreed to being presumed to have been incorporated in the written memoranda, and no warranty appearing in the charter party, no breach can be invoked. *Home Insurance Co. v. Merchants' Transportation Co.,* 1927 A.M.C. 57, 16 F.(2d) 372 (9CCA). If fraud or misrepresentation induced the libellant to enter into the agreement, or

> if statements were omitted by mistake, admiralty has no jurisdiction to correct the same or to entertain jurisdiction for breach of warranty not incorporated in the contract."
>
> *Gronvold v. Suryan,* 12 F. Supp. 429, 1936 A.M.C. 105, 107-108.

Please also see the cases discussed on pages 33, 34, 35, 36 and 37, 1953 supplement, volume 1, Benedict on Admiralty, Sixth Edition.

In the case of *Mulvaney, etc. v. Dalzell Towing Co.,* 1950 A.M.C. 1053, the personal representative of a deceased seaman commenced an action for wrongful death under the Jones Act. The tort action itself was barred because it was not filed within the time limit of three years. The libellant attempted to state a cause of action against the respondent for the breach of an alleged agreement pursuant to which the respondent promised the libellant that it would "make a fair, reasonable and equitable settlement providing the libellant would refrain from instituting a suit." Libellant alleged that she relied on the promise and representation of the respondent which the latter did not intend to keep and which it had failed to keep.

The respondent excepted to the libel upon the ground, *inter alia,* that there was a "failure to state a cause of action, in the admiralty and maritime jurisdiction of [the] court." In disposing of the exceptions the trial court ruled as follows:

> "If this is an action for breach of *contract to compromise and settle,* it is *not* within the admiralty jurisdiction. And that would be equally true if it were an action for fraud and deceit as libellant suggests in its affidavit. *James Richardson & Son v. Conners Marine Co.,* 1944 A.M.C. 444 (2CA), 141 F. (2d) 226, 228;

Netherlands American Steam Nav. Co. v. Gallagher (1922, 2CA), 282 Fed. 171, 176. Nor has there been alleged any other valid ground of federal jurisdiction on the basis of which jurisdiction may be assumed over connected but non-maritime causes of action.

* * * * * * *

"The only construction of the libel which does not cause a dismissal on the merits is that the libel intends to state a claim at law for breach of contract or for fraud and deceit and, if so, it must be dismissed because not within the admiralty jurisdiction.

"It will sufficiently dispose of this application if the first exception is sustained.

"Libel dismissed for want of jurisdiction." (Emphasis added.)

Mulvaney, etc. v. Dalzell Towing Co., 90 F. Supp. 259, 1950 A.M.C. 1053, 1054-1055.

Therefore, it is respectfully submitted that whether the release was or was not invalid is governed exclusively by the substantive law of the State of California and that the burden of proof rule established by the statutes and decisions of the appellate courts of the State of California in an action where a release is pleaded as a defense are and each thereof is clearly applicable to the determination of the validity of the California contract executed by the appellant.

Is was *assumed* by the Supreme Court in *Garrett v. Moore-McCormack* that the General Maritime Law was the substantive law applicable in determining the validity of a release and that therefore the assumed admiralty "burden of proof rule" was applicable. Applying the *actual* rule to the instant case, the contract was executed in California and is therefore a California contract. Its validity must be tested by the substantive law of the State of California and

part of that substantive law is the burden of proof rule applied pursuant to the provisions of the Code of Civil Procedure on the subject of presumptions and burden of proof. (*Garrett v. Moore-McCormack Co.,* 317 U.S. 239; 87 L. ed. 239.)

The United States Supreme Court silently assumed, but did not have presented to it as a disputed question of law, that a release executed by a seaman is a maritime contract. Therefore the doctrine *stare decisis* is not applicable and the decision is not authoritative precedent against the point asserted in this subdivision of the petition. The point is open for decision; it is an important and controlling point with reference to "burden of proof" if that subject is material and relevant to the appeal by the appellant and should be the subject of a distinct ruling.

Ground Three

On page 6 of appellant's opening brief he sets forth his "Specification of Errors" relied upon under the designation: "Assignment of Errors". They are as follows:

> "A. The District Court erred in granting a Summary Judgment in favor of the defendant.
>
> "B. The District Court erred in depriving the Plaintiff of a trial by jury to determine the following questions of fact:
>
> "1. Question of Fact of unseaworthiness;
>
> "2. If injury resulted from unseaworthiness, the amount of damages plaintiff sustained for loss of wages and general damages;
>
> "3. The amount of money to which the Plaintiff was entitled to receive for unearned wages, transportation, loss of personal effects;
>
> "4. Bonus, and wages to the date Plaintiff was alleged to have been fit for duty, *in order to deter-*

mine what amount, if any, was the consideration for a general release;

"5. The District Court erred in sustaining the release given by Plaintiff to Defendant for an *inadequate consideration without a full knowledge of his rights and economic coercion;*

"6. The District Court erred in *finding* that *a return of consideration by Plaintiff to Defendant was required before the Court could set aside the release.*" (Tr. Rec. p. 6, ll. 3-26.)

"*Formal* exceptions to rulings or orders of the court are unnecessary; *but* for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, *if* a party *has no opportunity to object to a ruling or order* at the time it is made, the absence of an objection does not thereafter prejudice him." (Rule 47, F.R.C.P., emphasis added.)

Appellee has printed in full in the Appendix attached hereto the statute enacted by the Congress pursuant to which the United States Supreme Court was vested with the power "to prescribe by general rules, for the district courts of the United States * * * the forms of * * * the motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of *any* litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect. * * *." (Act of June 19, 1934, c. 651, § 1, 2 (48 Stat. 1064).) (Emphasis added.)

Thus, there is no room for a contention that a seaman who happens to be a litigant in a federal district court is not required to obey the Rules of Civil Procedure just the same as any other litigant and that, in order to present *any* claim of alleged error to a United States Court of Appeals he is required, as a condition precedent thereto, for *all* purposes for which an exception has heretofore been necessary, to make known to the court at the time of a ruling his *objection to the action of the court and his grounds therefor.* (Rule 46, F.R.C.P.)

Thus the objection stating proper grounds takes the place of the old practice which required that an exception be taken to the action or ruling of a trial court before any court of appellate jurisdiction would entertain a claim of alleged error based upon such action or ruling. This Court cannot lawfully reverse the judgment in the case at bar because of the procedure adopted by the trial court in hearing the motion for a summary judgment unless the appellant objected thereto in the trial court and stated the grounds of his objection thereto.

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding *must* disregard any error or defect in the proceeding which does not effect the substantial rights of the parties." (Rule 61, F.R.C.P.) (Emphasis added.)

If this Court had not overlooked the act of the Congress, supra, and the two foregoing Rules of Civil Procedure, ap-

pellee does not believe it would have permitted the appellant to claim error based upon a record which does not show that he made any objection upon any ground to the *procedure* adopted by the trial court or any objection upon any ground to the use and consideration by the trial court of the "Transcript of the Evidence", the exhibits on file and the remaining "records and files" in the action in the trial court; or that this Court would have considered as error the various matters and things referred to by the Court in its Opinion as the grounds upon which it reversed the judgment of the trial court and in so doing basing the reversal upon matters as to which no objection was made in the trial court and in disregard of the plain fact that they were not made the subject of specifications of error in the opening brief of appellant. Thus the failure of the Court to take cognizance of these established rules of procedural and substantive law has reacted to the extreme prejudice of the appellee.

This Court has provided in its rules relevant to briefs, that the appellant's *opening* brief *shall* contain:

> "In all cases a specification of errors relied upon which shall be numbered and set out separately and particularly each error intended to be urged. * * * In all cases when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. * * * A concise argument of the case * * * exhibiting a clear statement of the points of law or facts to be discussed, with a reference to the pages of record and the authorities relied upon in support of each point." (Rule 18, Subdivision 1; Subdivisions 2(d), 2(e).)

Assignment "A", "The District Court erred in granting a summary judgment in favor of the defendant" does not set out particularly or at all, the error intended to be urged. It

specifies nothing and presents nothing for review. This court so held in *United States v. Cushman,* 136 F.2d 815.

All of the assignments set forth pursuant to Assignment of Error "B" (opening "Brief for Appellant", p. 6.) are confined to a contention that the District Court erred in depriving the plaintiff of a trial by jury to determine six purported questions of fact.

None of these specifications of alleged error excepting "A", "B-4", "B-5" and "B-6" is in the *slightest* degree pertinent to the order granting the appellee's motion for a summary judgment upon the ground that there was no genuine issue of fact relevant to the *separate and special* defense premised upon the general release of appellant's claim for personal-injury damages based exclusively upon the *statutory* cause of action known as the "Jones Act" or the special and separate defense raised by the appellee's contention that in any event the appellant had ratified the contract of release.

The rest of the specifications are premised upon the utterly fallacious contention asserted by appellant in his opening brief that "the determination of liability as well as the question of the amount of damages, if any, was a prerequisite to the determination of the validity of the release." (Brief for Appellant, p. 13.) Perhaps this Court embraced this novel and unsound theory of the appellant.

It seems to appellee that, for the purposes of a motion for summary judgment, a special defense based upon a release and ratification is an implied admission to the effect that up to the time of the execution of the release the seaman was in a position to introduce enough evidence to make out a *prima facie* case of actionable negligence against the ex-employer but that the release wiped out any right to assert the cause of action in the absence of a rescission regardless of the previous status.

Therefore, it is inconceivable that the appellee, in the instant case, was required to do anything more than to convince the trial court that there were no genuine issues of *material* fact relevant to the validity of the release or the subject of ratification; and that there was no burden, in addition, to prove by a preponderance of evidence or beyond all reasonable doubt or otherwise that the seaman did not have a *prima facie* cause of action before the release was executed.

If this Court believes otherwise, appellee respectfully requests that it so state *distinctly* so that the appellee will have a *fair* opportunity to demonstrate to the Supreme Court of the United States by a petition for a writ of certiorari exactly what this Court has held in this respect in the practical consideration and application of the provisions of Rule 56, F.R.C.P., in a case involving a "seaman" as one of the parties and procure a clear-cut approval or disapproval of such holding. It is always difficult to convince the Supreme Court that it should grant such petition if the point urged merely "lurks" in the background of what a United States Court of Appeals actually said and did, and bringing it out requires the petitioner to resort to a syllogistic analysis thereof.

The specifications of error asserted by the appellant on page 6 of his opening brief are not sufficient, according to Rule 18 promulgated by this Court, to raise the only question of law which could be pertinent to an appeal from the summary judgment. All of them combined do not assert and none of them alone asserts with particularity or at all any contention that the trial court committed error in deciding that, as a matter of law, there were no genuine issues of material fact relevant to the validity of the release or the ratification of said contract by the appellant.

With reference to specifications B-1 and B-2, there is no cause of action set forth in the complaint based upon the General Maritime rule that the owner of a vessel and the vessel itself are and each thereof is liable in damages to any seaman who suffers injury as a proximate result of the unseaworthiness of the vessel or a failure on the part of the owner thereof to supply and keep in order the proper appliances appurtenant to the vessel. The first cause of action specifically avers

> "That the plaintiff is a seaman and this action is brought to recover damages for personal injuries under a Federal Statute, to wit, Section 33 of the Merchant Seamen's Act of June 5, 1920, amending Section 20 of the Seamen's Act of March 4, 1915, and jurisdiction herein is claimed by virtue of said statute." (Transcript of Record, p. 2, l. 22 to p. 3, l. 1.)

There was, therefore, no possible issue of fact, genuine, material or otherwise which could have been submitted to any jury under the unseaworthiness doctrine. An indispensable condition precedent to the maintenance of a cause of action for damages premised upon the unseaworthiness doctrine of the General Maritime Law is that the court in which the action is filed has jurisdiction of the parties and the subject matter of the suit. The United States District Court is without jurisdiction to entertain such a cause of action in the absence of diversity of citizenship. (*Modin v. Matson Navigation Co.,* 128 F.2d 194.) Therefore, it is obvious that the trial court could not have committed any error in depriving the plaintiff of a trial by jury to determine any questions of fact, assuming without conceding that any question of fact did exist, with reference to "unseaworthiness" or with reference to "the amount of damages plaintiff sustained for loss of wages and general damages" purportedly *resulting from unseaworthiness.*

The District Court could not have committed any error in depriving the plaintiff of a trial by jury to determine any question of fact with reference to the amount of money which the plaintiff was entitled to receive for "unearned wages, transportation, (or) loss of personal effects" for the simple reason that there is no averment in the complaint with reference to these matters and these elements could not by any possibility be included within or considered as elements of damage in an action premised solely and exclusively upon the Jones Act. Any cause of action which the plaintiff might have had with reference to "unearned wages, transportation, (or) loss of personal effects" could not be maintained in a United States District Court with the right to trial by jury unless a controversy in that respect "exceeds the sum or value of $3,000, exclusive of interests and costs and arises under the constitution, laws or treaties of the United States" *and* there is a diversity of citizenship.

There is no averment in the complaint to the effect that plaintiff was not paid all wages, earned or unearned, to the date he was declared fit for duty by the United States Public Health Service. With reference to Specification B(4), construing it *liberally,* said specification is a contention, raised for the first time on appeal, that there was an issue of fact with reference to the *amount* of a bonus and wages owed, as a matter of law, to the plaintiff on the date when he was declared fit for duty by the United States Public Health Service.

The trial court ruled that, as a matter of law, there was no genuine issue of material fact relevant to the proposition that "plaintiff was declared fit for duty by (the) United States Public Health Service on August 18, 1949." (Transcript of Record, p. 49, ll. 22-25.)

Said specification B(4), however, does *not* set forth a contention that any of the evidence available to either of the

parties upon this subject was in conflict or that the trial court committed any error in ruling, as a matter of law, that there was no genuine issue of material fact upon which a jury could have found that the date upon which plaintiff was actually declared fit for duty by the United States Public Health Service was *not* August 18, 1949; or the ruling of the trial court, that, as a matter of law, there was no genuine issue of material fact relevant to the proposition that the *actual* amounts of bonus and wages owing to the plaintiff by the defendant immediately before the execution of the release were, respectively, any sum in excess of $25.00 for bonus and $272.43 for unearned wages.

Said Assignment of Error B(4) does not set out particularly or at all any contention that the Trial Court erred in ruling, as a matter of law, that there was no genuine issue of material fact with respect to the propositions that the net sum owed by the defendant to the plaintiff with reference to *all* of his claims arising out of the Shipping Articles, other contracts and/or the General Maritime Law as to maintenance, was any sum in excess of $465.46 or that the amount paid as a consideration for the general release was the difference between $465.46 and $1,500.

With further reference to Assignment of Error B(4), appellant cannot present any claim of error with respect thereto because he does not, anywhere in his brief, refer to any part of the "Transcript of Record" which would support a contention that there was *any* question of fact (genuine, material or *otherwise*) relevant to the elements specified in said Assignment of Error.

Assignment of Error B(5) *assumes,* as premises, that the release was executed by plaintiff for an inadequate consideration, without a full knowledge of his rights and as a result of economic coercion. Appellant does not refer

to any part of the record on appeal which supports the foregoing assumptions or any thereof. In order to justify this Assignment of Error, unless it appears *affirmatively* on the face of the valid "TRANSCRIPT OF RECORD", filed in this Court on May 21, 1954, the appellant must point his finger to some "evidence" from which it reasonably appears that there was a genuine issue of material fact relevant to the *assumed* premises. There is nothing in the record on appeal which indicates any such "genuine issue of material fact". In any event, appellant has not referred to any page of the record on appeal where it can be found.

Assignment of Error B(6) does not set out particularly, or at all, the error, if any, intended to be urged. It specifies nothing and presents nothing for review. (*U. S. v. Cushman,* 136 F.2d 815.) Said Assignment of Error B(6) is no different than an assignment that "the trial court erred in ordering judgment" which this Court held, in *U. S. v. Cushman, supra,* to be fatally defective and insufficient to present any issue of law pursuant to which this Court could hold that the trial court committed any error whatever.

Specification B(6) is fatally defective in another respect. It is directed solely to a contention that "the District Court erred in *finding* that a return of consideration by plaintiff to defendant was required before the court could set aside the release." Rule 18(d) requires: "In *all* cases when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

So that there will be no justifiable foundation for a conclusion that the undersigned is in any wise attempting to mislead the Court with reference to this particular point addressed to the insufficiency of Specification B(6) it is pointed out that that word "finding" in the Rule, in all probability may not have been intended to cover "Findings" of

fact made by a trial court on a motion for a summary judgment. Pursuant to Rule 56, Rules of Civil Procedure, it would be more reasonable and logical to conclude that there are no "Findings of Fact", within the usual meaning of that phrase, contained in the document entitled "Findings of Fact" in the case at bar.

"Findings of Fact" are ordinarily required when the *pleadings* raise a substantial issue of fact, even though the evidence introduced in support of the averments set forth by the respective parties in their pleadings is uncontradicted. Therefore the "Findings of Fact" in the case at bar should be viewed in the same light. Each "Finding of Fact" in the case at bar was, in effect, a *ruling* by the trial court that the material facts set forth therein were the only facts or evidence disclosed and brought to the attention of the trial court for examination by the trial court in the consideration and determination of the legal issue involved in the motion.[1] Therefore appellant cannot contend in this Court that the trial court committed an error of law in his determination that there was no genuine issue of material fact with reference to any of said elements unless he points to some part of the Transcript of Record filed May 21, 1954 which will sustain his contention. The simple fact is that nowhere in his Brief does he attempt to do this.

The Manual of Federal Appellate Procedure (Third Ed.) 1941, authored by Paul P. O'Brien, Esq., sets forth a review of the decisions affecting briefs in a manner that cannot be improved upon. Appellee therefore quotes therefrom as follows:

> "The brief should follow strictly the rule providing for stating separately and particularly the errors

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1. "That there is no genuine issue as to any material fact set forth hereinabove in these Findings of Fact." (Tr. Rec. p. 52, ll. 8-9.)

asserted and intended to be urged; (Reid et al. v. Baker (CCA 9), 17 F.(2d) 770.) and where the error alleged relates to the admission or rejection of evidence, the full substance of the evidence admitted or rejected should be quoted or stated. (Weiland v. Pioneer Irr. Co. (CCA 8), 238 F. 519, 523; Winterton Gum Co. v. Autosales Gum & Chocolate Co. (CCA 6), 211 F. 612; Cullins v. Finley (CCA 9), 94 F.(2d) 935; United Cigar Whelan Stores Corp. v. U. S. (CCA 9), 113 F.(2d) 340; Waggoner v. U. S. (CCA 9), 113 F. (2d) 867.) Failure to set out the specifications of error relied upon in a brief warrants an affirmance of the judgment. (Lohman v. Stockyards Loan Co. (CCA 8), 243 F. 517; City of Goldfield, Colo. v. Roger (CCA 8), 249 F. 39.) Concerning specifications of error relied on, each specification should conform substantially, if not literally, to the particular assignment of error on which it is predicated, and for convenience there ought to be, with each specification in the brief, a reference to the corresponding assignment of error, as well as to the place in the bill of exceptions or other part of the record where the alleged error is shown, the relation of each specification to its corresponding assignment should be in some way distinctly indicated. (Vider et al. v. O'Brien (CCA 7), 62 F. 326.) Unless the brief contains a reference to the pages of the record and the authorities relied upon in support of each point, the court will deem the errors assigned not of sufficient importance to require a search for them. (City of Houston v. Southwestern Bell Tel. Co., 259 U.S. 318, 352, 42 S. Ct. 486, 66 L.Ed. 961; Lawson v. U. S. (CCA 7), 9 F.(2d) 746; Feinup v. Kleinman et al. (CCA 8), 5 F.(2d) 137; Varner et al. v. Clark (CCA 8), 283 F. 17, 19; Walton et al. v. Wild Goose Min. & Trad. Co. (CCA 9), 123 F. 209; Wallace v. Hudson-Duncan & Co. (CCA 9), 98 F.(2d) 985.) Statements in brief may be considered as admissions of fact. (Young & Vann Supply Co. v. Gulf F. & A. Ry. Co. et al. (CCA 5), 5

F.(2d) 421.) Language with respect to opposing party or counsel must be respectful, otherwise brief will be stricken from the files. (Supreme Council of the Royal Areanum v. Green, 237 U.S. 531, 35 S. Ct. 724, 59 L.Ed. 1089.) Considerable latitude is indulged in in an appeal prosecuted *in forma pauperis,* and where brief is prepared by the individual litigant, who is not a member of the bar, it will not be stricken from the files, nor will the appeal be dismissed, for a failure to strictly comply with the rule. (Edwards v. Bodkin (CCA 9), 249 F. 562.) Briefs should be filed within the time stated in the rule, but this is not jurisdictional, and a dismissal for failure to file within the time prescribed will not necessarily follow. (Matsumura v. Higgins, etc. (CCA 9), 187 F. 601; Hupper v. Hyde, etc. (CCA 5), 296 F. 862; Cardigan v. White, etc. (CCA 8), 18 F. (2d) 572.) Where appellant neither files a brief nor appears at the time the cause is called for hearing, the cause is subject to dismissal, but where the appellee has filed a brief, the court will proceed to a determination of the cause on the merits. (Plazuela Sugar Co. v. Alvarez (CCA 1), 295 F. 511; Zaluondo v. Civille (CCA 1), 295 F. 691.)

"The Court of Appeals for the Eighth Circuit refused filing of a brief for appellee because presented out of time with no proper reason for its not being filed in time. (Cardigan v. White, etc. (CCA 8), 18 F. (2d) 572.)

"The necessity for complying with the rule regarding setting out the specifications of error relied on, and that the rule in effect requires counsel to specify from the errors assigned in the court below, which are frequently numerous, those upon which they will rely for reversal, and that the rule 'will be enforced by the court, to the end that the vital issues in the case may be clearly presented', and that a failure to observe the rule is ground for affirmance is stressed in these words: 'If the rule is observed the arguments of counsel and

the consideration of the court are concentrated upon the important questions in controversy, instead of being scattered and dissipated by the argument in consideration of numerous side issues, that, if at all material, are generally governed by the decision of the main questions, and in this way a just result is more speedily and certainly attained'. (Harrow-Taylor Butter Co. v. Crooks, etc. (CCA 8), 41 F.(2d) 627; Harold Lloyd Corporation, et al. v. Witwer (CCA 9), 65 F.(2d) 1, 15; Angco et al. v. Standard Oil Co. of California (CCA 9), 66 F.(2d) 929; Coates v. U. S. (CCA 9), 59 F.(2d) 173; Steinberger et al. v. U. S. (CCA 9), 81 F.(2d) 1008; Huffman v. Baldwin et al. (CCA 8), 82 F.(2d) 5.)

"The court (CCA 9) has definitely announced that Subdivision 2(d) of Rule 18 must be strictly complied with, particularly stressing the necessity of setting out in the brief the specifications or assignments of error relied upon. (See, Gelberg, etc. v. Richardson, etc. (CCA 9), 82 F.(2d) 314; Gripton v. Richardson, etc. (CCA 9), 82 F.(2d) 313; Berry v. Earling, etc. (CCA 9), 82 F.(2d) 317; Barnett et al. v. U. S. A. (CCA 9), 82 F.(2d) 765; Hultman, etc. v. Tevis (CCA 9), 82 F. (2d) 940.)

"Purported reports not admitted in evidence included in appendix to brief cannot be considered unless introduced in evidence and included in proper record. (Zell v. Bankers' Utilities Co. Inc. (CCA 9), 77 F.(2d) 22.)

"The Appellate Court will not pass on questions suggested only in the briefs and not in any manner based on the record. (Wabash Ry. Co. v. American Refrigerator Transit Co. (CCA 8), 7 F.(2d) 335, 352.)

"Points not argued in the brief are presumed to be abandoned. (Central R. Co., etc. v. Shick (CCA 3), 38 F.(2d) 968, 972; McCarthy et al. v. Ruddock (CCA 9), 43 F.(2d) 976; Forno v. Coyle (CCA 9), 75 F.(2d) 692. See, also, Humphreys Gold Corp. v. Lewis (CCA 9), 90 F.(2d) 896.)

"A single specification urging error in the rejection of evidence and in the giving and refusing to give instructions is not in accordance with the rule as covering more than one point. Such alleged errors should be set out separately and particularly and when the error alleged is as to the charge of the court, the specification should set out the part referred to *totidem verbis,* whether it be in instructions given or instructions refused. (Burnstein et al. v. U. S. (CCA 9), 55 F.(2d) 599, 604; Coates v. U. S. (CCA 9), 59 F.(2d) 173.)

"The court is disinclined to consider a point raised for the first time in a petition for rehearing (all points relied upon should be included in the opening brief). (Bassick Mfg. Co. v. Adams Grease Gun Corp. (CCA 2), 54 F.(2d) 285.)

"Rule as to the filing of briefs is a rule of convenience and it is within the discretion of the court to permit the appellant to file copies of a brief *nunc pro tunc.* (Delaware & Hudson Co. v. Stankus (CCA 3, 63 F.(2d) 887, 888. See, also, McGrath, etc. v. Nolan et al. (CCA 9), 83 F.(2d) 746.)

"Objections and assignments of error not pressed in brief will be disregarded. (Consolidated Interstate-Callahan Min. Co. v. Witouski et al. (CCA 9), 249 F. 833; Lee Tung v. U. S. (CCA 9), 7 F.(2d) 111; E. K. Wood Lumber Co. v. Moore Mill & Lumber Co. (CCA 9), 97 F.(2d) 402, 404; Humphreys Gold Corp. v. Lewis (CCA 9), 90 F.(2d) 896; Commissioner of Internal Revenue v. O'Donnell (CCA 9), 90 F.(2d) 907; Lonergan v. U. S. (CCA 9), 88 F.(2d) 591; Moore v. Tremelling (CCA 9), 100 F.(2d) 39, 43.)

"Points not raised by objection and exception, nor referred to in assignments of error, but made in the brief on appeal for the first time will be ignored. (Bitker v. Rosenberg (CCA 7), 68 F.(2d) 196; Ford Motor Co. v. Chas. A. Myers Mfg. Co. (CCA 6), 64 F.(2d) 942.)

"Issues not specifically raised by pleadings, cannot be first raised in the assignments of error and the briefs.

(Continental Casualty Co. v. U. S. (CCA 7), 68 F.(2d) 577.)

"With respect to the necessity of complying with the rule concerning the jurisdictional statement, it is held that a failure to include such a statement if the briefs may be taken as good ground for compelling the reprinting of the offending briefs. (Credit Bureau of San Diego, Inc. et al. v. Petrasich et al. (CCA 9), 97 F.(2d) 65, 67.)"

Manual of Federal Appellate Procedure, O'Brien, (Third Ed.) 1941, pp. 209-213.

"Matters not argued, and no authorities cited to sustain suggestions of error, will be regarded as waived; (Hubshman et al. v. Louis Keer Shoe Co. Inc. (CCA 7), 129 F.(2d) 137, 142; American Ins. Co. v. Scheufler, etc. (CCA 8), 129 F.(2d) 143.)

"Where an issue (except of jurisdiction) has not been raised or considered by the trial court, but is presented for the first time, the appellate court will not examine it, particularly where the matter is one of fact and the record fails to reveal sufficient for a determination of the issues; (Goldie v. Cox (CCA 8), 130 F.(2d) 690, 715.)

"Questions argued on oral argument which the record does not disclose to have been raised in the trial court, and which are not argued in either brief will not be considered; (Hinton et al. v. Columbia River Packers Assn., Inc. (CCA 9), 131 F.(2d) 88.)

"Failure of appellant to specify point in statement of points filed, in its brief on appeal, nor to argue the point in the brief, will not receive consideration. (Thomas et al. v. El Dorado Irrigation Dist. (CCA 9), 126 F.(2d) 922; See, also, Zap v. U. S. (CCA 9), 151 F.(2d) 100; Martin et al. v. Sheely et al. (CCA 9), 144 F.(2d) 754.)

"To review errors alleged upon the rejection of exhibits as evidence in a case, the briefs, as required

by Rule (CCA 9), should quote the full substance of the (rejected exhibits) and refer to the page number in the transcript where the same may be found. (Hemphill Schools, Inc. v. Commissioner of Internal Revenue (CCA 9), 137 F.(2d) 961.)

"A specification that the trial court erred in ordering judgment is not a proper specification of error. It does not set out particularly, or at all, the error, if any, intended to be urged. It specifies nothing, and presents nothing for review. (U. S. v. Cushman (CCA 9), 136 F.(2d) 815. For a construction of Rule 20(d) (CCA 9), re specification of errors, and the setting out of such specifications in brief, see Monaghan v. Hill (CCA 9), 140 F.(2d) 31; Peck et al. v. Shell Oil Co., Inc. et al. (CCA 9), 142 F.(2d) 141; Conway v. U. S. (CCA 9), 142 F.(2d) 202; Tudor v. U. S. (CCA 9), 142 F.(2d) 206; Jung et al. v. Bowles, etc. (CCA 9), 152 F.(2d) 726.)

"It is essential for a proper review of a specification of error relative to the failure of the court to give an instruction, that a timely request for such an instruction, or a timely objection be made to the court's omission to give the instruction requested. (Bercut v. Park Benziger & Co. (CCA 9), 150 F.(2d) 731.)"

Third Cumulative Supplement to *O'Brien's Manual of Federal Appellate Procedure* (Third Edition), p. 91.

Notwithstanding the clear provisions of the foregoing rules of the United States Court of Appeals, for the Ninth Circuit; the doctrine of *stare decisis* with respect to the requirement that they be obeyed, in *all* cases and by *all* parties, and in disregard of the provisions of Rule 75, Rules of Civil Procedure, hereinabove referred to, this Honorable Court impliedly indicates by the form and substance of its Opinion filed April 15, 1955 that it is not necessary for the

appellant to comply with these rules or be bound by the doctrine of *stare decisis* with respect to the effect of a failure to comply with the rules simply because he happens to be a seaman; and has inadvertently overlooked its own rules, the Rules of Civil Procedure applicable to appeals and established precedent with respect to rules which have been recognized by practically all courts of appellate jurisdiction in the United States.

It appears to appellee-petitioner that the Opinion affirmatively shows that the Court has not considered the restrictions which Rule 75, F.R.C.P. have placed upon it in its use and consideration of matters or things which are completely extraneous to the valid "Record on Appeal" prepared in strict accordance with said rule. Appellee also infers from the Opinion that this Court overlooked, because of its *fallacious* assumption that it was its duty to *protect* the appellant, the obvious failure of the appellant to set out separately or particularly any claim that the Trial Court committed any error prejudicial to the rights of the appellant, with a reference to some part of the valid record on appeal which would support the contention. Appellee also contends that the Opinion shows on its face that this Court was probably misled by following unsupported statements in the appellant's briefs and did not examine the valid record on appeal to see whether such statements were or were not in accordance with the fact as shown by the record. The Opinion also shows on its face that the Brief for Appellee was not given the attention which a consideration of the substantial rights of the appellee required.

Appellee quotes from and comments upon various parts of the Opinion as follows:

> 1. "Accordingly, briefs were filed and at a subsequent session of the court, without a jury, the judge

> strongly intimated, in fact decided, that he had determined that the release was valid and suggested that defendant file a motion for a summary judgment. On the following date to which the court had continued the case for setting, the motion for a summary judgment was made by defendant." (Printed Opinion, p. 2.)

Comment A: The statement of the court near the top of page 2, printed Opinion, that "At a subsequent session of the court, (obviously referring to the first session of the court immediately after the briefs were filed) * * *, the judge strongly intimated, in fact decided, that he had determined that the release was valid" is *not* supported by either the valid record on appeal or the "Supplemental Transcript of Record" which found its way into the files of this court without any notice to the appellee that it was to be considered by this court as a valid part of the record on appeal. Appellee is not claiming and does not intend to suggest that the Court took part in or would approve the method by which this so-called "Supplemental Transcript of Record" was submitted to it as a purportedly valid supplemental record on appeal.

The said "Supplemental Transcript of Record", (Reporter's Transcript of Proceedings) on February 15, 1954, which was the first proceeding in open court after the "simultaneous" briefs were filed, shows the following:

> "The Court: I have gone over all your authorities relative to the question of the release. I have come to the conclusion that *if* this release is not good, no release is good. I *think* the release is an absolute defense; however, *I can't rule upon the matter this morning,* but *if* you will file a motion for summary judgment, I *will* rule on it. I don't *think* there is any necessity for setting the matter for trial. * * *

The Court: * * * I won't set the matter down for trial. I *will* dispose of this on a motion. * * *

The Court: There is no question of fact here. The release is a written release. *We* have *all the evidence before us.* I *can* pass upon that. I *think* I would be justified in directing a verdict on the ground the release is a complete bar.

* * * * * * *

The Court: *If* the release is no good, *then* we can try the matter before a jury and *decide* the question." (Emphasis added.) (Supplemental Transcript of Record, p. 2, l. 5 to p. 4, l. 9.)

It thus appears that the trial court did *not,* on February 15, 1954, *decide* that the release was valid. In fact, although inadvertently overlooked by this Honorable Court, the trial court was on February 15, 1954 without the slightest power to *decide* that the release was valid. The trial court was without power to decide that there was no genuine issue of material fact relevant to the validity of the release until a notice of motion and motion for a summary judgment upon that ground had been served, filed, and brought on for hearing in the manner required by the rules. The jurisdiction (the power to entertain and decide any issue) of a United States District Court is exclusively statutory.

Comment B: The "Transcript of Record" shows that on January 21, 1954 an order was entered declaring a mistrial and that the cause was continued to January 25, 1954 for resetting. (Transcript of Record, p. 67.) On January 25, 1954 there was a proceding and at that hearing the court ordered counsel to file simultaneous briefs on the question of the release and continued the case to February 15, 1954 for resetting. On February 5, 1954 defendant's 2nd Memorandum of Law was filed. On February 8, 1954 plaintiff's

Memorandum of Points and Authorities on Releases was filed.

The clerk's notation in the Civil Docket is not an accurate notation of the substance of the order actually made by the trial court with reference to the reason for the continuance. The "Supplemental Transcript of Record" shows that what the court actually stated from the bench but which was not accurately noted in the Civil Docket is as follows:

> "I will continue the *question* of setting until March 1. By that time you can file your motion?"
>
> "Mr. Sikes: Yes, your Honor."
>
> "The Court: All right." (Supplemental Transcript of Record of Proceedings on February 15, 1954, p. 4, ll. 14-18.)

Therefore an accurate statement of what happened on February 15, 1954 is that "the *question* of setting" was continued to March 1, 1954, for the purpose of permitting the defendant, in the meantime, to file a motion for summary judgment.

The next date upon which there was any proceeding was March 1, 1954. *This* was the date *following* the proceedings on February 15, 1954. On March 1 ,1954 the motion for summary judgment was *not* made by defendant. The "Supplemental Transcript of Record" shows that on March 1, 1954 the subject matter of setting the case for trial was not mentioned. The sole and only reason for the continuance from March 1, 1954 to March 8, 1954 was that the appellee had filed a motion for summary judgment on February 23 and that because of the rule requiring *ten* days' notice of the hearing of *such* motion it was necessary to notice the hearing of the motion for March 8, 1954. (Supplemental Transcript of Record, p. 6.) The defendant made the motion for a summary judgment on March 8, 1954 which was *not* "the

following date to which the court had continued the case for setting", as stated in the Opinion.

> 2. "Appellant claims that there are questions of material fact in the case which he has a right to have resolved by a jury and appellee *counters* with its *claim* that *the written release is in standard form,* that *the evidence presented to the discharged jury showed conclusively that appellant thoroughly understood the terms of the release* and *signed and accepted payment in accordance with it under legal and other advice* and *there was no 'overreaching'."* (Emphasis added.) (Printed Opinion, p. 2.)

Comment: Appellee's counsel, believing until he read the Opinion filed on April 15, 1955, that the appellee was entitled to assume that the appellant's "Transcript of Record" and his Opening Brief would be subject to exactly the same rules and decisions as are applicable to every other party, prepared, served and filed the Brief for Appellee in the form and content which he believed adequately covered all contentions which the *appellant* had set forth in his Opening Brief (in certain particulars as to which leniency and liberality might indicate that said opening brief complied with the requirements of the rules of this Court and the decisions construing the same).

An examination of appellee's brief demonstrates that it *countered* what it considered to be the only claims of the appellant which required any answer whatever, as follows:

(I) The fact that a formal issue as to the validity of the release was raised by operation of law did not entitle the appellant, *ipso facto,* to a trial by jury with reference to that proposition.

(II) Appellant's contention that Section 55 of Title 45 U.S. Code is applicable to a release and settlement is invalid.

(III) The appellant has failed to comply with the Rules of the United States District Court, Southern District of California.

(IV) The appellant ratified the contract of release by retaining the consideration and failing to return or offer to return any part or portion of the consideration.

That part of the "Brief for Appellee" under the heading "Statement of the Case", commencing on page 2 to and including page 19 was printed *solely* because Rule 18(c) requires "a concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised"; and by reason of appellee's opinion that the appellant had not complied with the requirement of the rule at all.

Appellee at the end of its "Statement of the Case" contended as follows: "The only point which is involved in this appeal is whether there was a genuine issue as to any material fact concerning the validity of the release." This single statement at the end of the "Statement of the Case" is the only part of the "Brief for Appellee", with the exception of Points I, II, III and IV, under the specific heading of "Argument" which shows the extent or manner in which the "appellee counters" the claims of the appellant. Appellee did not in any part of its brief under the heading of "Argument" state, directly or indirectly: "that the written release is in standard form, that the evidence presented to the discharged jury showed conclusively that appellee rightly understood the terms of the release and signed and accepted payment in accordance with it under legal and other advice and there was no 'overreaching'." (Page 2, Printed Opinion.)

Perhaps this court based its statement with reference to how appellee countered the claims of the appellant upon

a misreading or misconception of the reason for including in Point III the seventeen elements commencing near the bottom of page 23 and concluded at the top of page 26. What the appellant actually stated in its brief with reference to these seventeen elements is as follows:

> "Appellant's proposed findings *stated,* among others, the following material facts *as to which it contended there was no genuine issue:* * * *" (Brief for Appellee, page 23.)

The Opinion does not decide the issues of law raised in appellee's Point I, nor Point II, nor Point III, nor Point IV.

Everything set forth in appellee's "Point III" was set forth for the sole purpose of demonstrating that "the appellant has failed to comply with the rules of the United States District Court, Southern District of California", and the effect of such failure.

> 3. "No one disputes the premise that seamen are under the protection of the court, * * *" (Printed Opinion, p. 2.)

Comment: The language "that seamen are under the protection of the courts" does not appear *in haec verba,* in substance, or at all, any place in the "Brief for Appellee". Whether a seaman is or is not "under the protection of the courts" in the sense and within the meaning of that language as the Court must have intended to use it, was not and is not a question of law submitted to this court for decision. This court is not a trial court.

There is absolutely nothing in the Transcript of Record which shows, affirmatively, directly or indirectly, that Adrian Guerrero, the appellant, claimed to have been or was at the time he executed the release, *non sui juris* for any reason. There is nothing in the Transcript of Record

which shows that during the pendency of the action in the trial court Adrian Guerrero was *non sui juris* for any reason. No application was made for the appointment of a guardian ad litem which obviously would have been done if any suggestion had been made that he needed one.

There is no suggestion in the Transcript of Record or in the "Supplemental Transcript of Record" that during the period when Adian Guerrero was negotiating the settlement or at the time he executed the release and accepted the $1500 he was an incompetent person, or mentally incompetent or "by reason of old age, disease, weakness of mind or other cause, * * * unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof * * * likely to be deceived or imposed upon by artful or designing persons." (Probate Code, California, Section 1460.)

This Court is not authorized by any judicial power vested in it by an act of Congress, pursuant to its sole and exclusive legislative power under the Constitution of the United States, to take judicial notice of the fallacy that *all* persons merely because they are "seamen" are unable, unassisted, properly to manage and take care of themselves or their property or by reason thereof likely to be deceived or imposed upon by artful or designing persons. The Federal Courts, in construing the Jones Act, have determined conclusively that every person who is on board a vessel for the purpose of aiding in her navigation, is a "seaman". This includes the licensed deck personnel (master and mates), the licensed engine room personnel (the chief engineer and assistant engineers), the quartermaster, the radio operator, the able-bodied seamen, and the ordinary seamen.

Is it the considered opinion of this Honorable Court that *solely* because these men have the *occupational status of*

"seamen" that every one of them is entitled, when he becomes a litigant, to some *special and preferential* "protection of the courts" on the theory that *none* of them is *capable* of executing a *presumptively* valid release of *a disputed claim for damages?*

Appellee is well aware of the fact that for over one hundred years immediately last past various federal courts have by *obiter dictum* stated that "seamen are wards of the admiralty", "seamen are wards of the admiralty court", "they are emphatically the wards of the admiralty", there is an analogy "between seamen's contracts and those of fiduciaries and beneficiaries". The amazing thing about this situation is that there appears to be no decision in which it appears that any ship owner or ship operator has ever challenged the validity of these assumptions or pointed out that they are premised exclusively upon an arbitrarily discriminatory and basically unsound classification of *all* seamen as persons who are by reason of old age, disease, weakness of mind, or other cause, unable, unassisted, properly to manage and take care of themselves or their property and by reason thereof are likely to be deceived or imposed upon by artful or designing persons. More will be said about this in a subsequent subdivision of this petition.

This Honorable Court did not procure from appellee any concession that there is a "premise that seamen are under the protection of the courts". Therefore the statement that "no one disputes the premise that seamen are under the protection of the courts" indicates that the court either misconceived or misunderstood the contents of the "Brief for Appellee".

> 4. "No one disputes * * * that the burden is on the employer to show the validity of the release." (Printed Opinion, p. 2.)

Comment: The appellee did not in its brief, concede "that the burden is on the employer *to show the validity of the release*". This question was not an issue in the trial court. The sole questions submitted to the trial court for decision were *whether there was or was not a genuine issue as to any material fact relevant to the validity of the release,* or with respect to *ratification.*

The statement made in the "Memorandum of Points and Authorities" served and filed with the Notice of Motion and the Motion for Summary Judgment that "there is no question but that the standard relative to releases executed by seamen is that set up by the Supreme Court in *Garrett v. Moore-McCormack Co.*" (Transcript of Record, p. 22, l. 25 to p. 23, l. 1.) is not a concession that on *a motion for a summary judgment,* there is no dispute about the proposition "that the burden is on the employer to show the validity of the release". The comment made in the "Memorandum of Points and Authorities" was probably an *erroneous* concession that under the facts of the *Garrett* case, as set forth in the Opinion by the Supreme Court, there is no question about the proposition "that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion and that it was made by the seaman with full understanding of his rights." It was, however, *"obiter dictum"* by appellee's trial court counsel. It was *not* relevant to a motion for a summary judgment where no burden of *proof* is imposed on *either* party.

Such court-created presumptions are not, in any event, admissible *in* or *as evidence* any longer because of the provisions of Rule 43(a), Rules of Civil Procedure and the act of the Congress plainly stating that *all* laws in conflict with said rules "*shall* be of no further force or effect."

The statement of the Supreme Court as to "burden" was made after a jury had decided as a question of fact that Garrett had executed a full release of a claim for damages for the sum of $100 and that at the time he executed the same he had no knowledge of having signed such an instrument and that his signature was obtained through fraud and misrepresentation and without legal, binding and valid consideration; that Garrett's discussion of the subject matter of the release with Moore-McCormack Company's claim agent took place while Garrett was under the influence of drugs taken to allay the pain of his injury; that he was threatened with imprisonment if he did not sign as directed, and that he considered the $100 a payment of wages. Garrett, according to his testimony in the trial court, if accepted by the jury, was not only induced to perform the very act of executing the release by fraud, misrepresentation and threat of imprisonment; he was also subject to a serious diminution of his normal mental faculties because of narcotics. No such claims appear, *from the record on appeal,* to have been brought to the attention of the trial court in the instant case. For these reasons it is contended by appellee that the "rule" with reference to burden of proof in the *Garrett* case would not be authoritative precedent applicable to facts in the instant case.

In any event, and regardless of the view this Honorable Court may take with reference to anything that may have been stated in the "Memorandum of Points and Authorities" filed in the Trial Court or the "Brief for Appellee" (including what was said on page 26 thereof) the entire discussion of the subject of "burden of proof" is irrelevant and immaterial to a motion for summary judgment upon the ground that there is no genuine issue of material fact relative to the validity of a release. "Burden of proof"

means that a party who asserts affirmatively in a pleading that his adversary committed any specified act or omitted to do something which he was required to do and that such act or omission proximately caused injury or damage to the plaintiff must prove such allegations by a preponderance of evidence if the answer denies such allegations and thus raises genuine issues of material fact which require a decision by a court or jury with reference to the actual truth.

It has been conclusively established by many decisions of the Courts of appellate jurisdiction in the State of New York, where the summary judgment procedure was apparently originated, and the federal courts since the promulgation of the Rules of Civil Procedure by the Supreme Court that if there is a genuine issue of material fact relevant to the determination of the ultimate fact in issue, then a summary judgment cannot be granted.

There cannot be any possible application of the "burden of *proof*" rule to the duty of the moving party in a proceeding to procure the entry of a summary judgment. The Courts cannot say in one breath that if there is a genuine issue of material fact the motion cannot be sustained and in the next breath say that the moving party must prove, by a preponderance of *evidence,* as on the trial of genuine issues of fact raised by the pleadings, that such party is entitled to an order granting a motion for a *summary* judgment.

There was no burden upon the appellant to prove conclusively or otherwise, on the motion for a summary judgment, *that the plaintiff executed the release freely or without deception or coercion, or that it was executed by him with a full understanding of his rights.*

This Court has inadvertently misconceived or misconstrued the Rules of Civil Procedure with respect to the nature of a motion for a summary judgment. A motion for a summary judgment is exactly the same, in effect, as a motion for a directed verdict with the exception of the fact that no jury happens to be in attendance at the time a motion for summary judgment is presented.

It is submitted that when one of the parties to an action on the law side of a United States District Court presents a motion for a summary judgment it is the implied, if not express, duty of the attorneys representing the respective parties to disclose to the trial court for its examination all competent and material evidence which would be introduced in the event of a trial before a jury.

The trial judge is not authorized in any such proceeding to resolve or ignore conflicts which may appear in any competent and material evidence which either of the parties discloses to the court is available to such party and which such party intends to establish by oral or documentary proof and upon which the ultimate outcome of the litigation would depend. The trial court does not make any "findings of fact" within the ordinary meaning of that phrase. If from a consideration of the material facts set forth by the trial court in the "Findings of Fact" as the only evidence which either of the parties contends is available or will be offered in evidence, it appears that there is no genuine issue as to any material fact upon which the ultimate decision might depend, the trial court so declares and thereupon renders a summary judgment.

The fact that counsel for each of the parties is bound by a clear duty to aid the court, and in the discharge of that duty required to disclose to the court the evidence upon which such party relies either in support of or in opposition

to the motion, does not justify a conclusion that any burden of *proof* is involved. There *is* a burden of *producing* for *examination* by the trial court *all* evidence, direct or indirect, which either of the parties claims supports or would support a verdict in his favor.

In *Reynolds v. Maples* (C.A. Miss. 1954) 214 F.2d 395 the court held as follows: Sufficiency of the allegations of counterclaim did not control in determining whether *plaintiff's* motion for summary judgment on counterclaim should be granted, and although burden of "proof" (sic) was on plaintiff to demonstrate clearly that there was no genuine issue of fact, *defendant was required to disclose sufficiently what the evidence would be to show that there was a genuine issue of fact to be tried.*

In *American Airlines v. Ulen* (App. D. C. 1949) 186 F.2d 529 the court held as follows: Where the complaint and answer *raised genuine issues as to material facts of negligence* but, *before* summary judgment was granted, the trial judge had in addition to the pleadings before him, interrogatories of plaintiff and defendant's sworn answers thereto which showed undeniably that defendant was negligent, plaintiff's motion for summary judgment was properly granted.

Rule 56(b), Rules of Civil Procedure, provides, in part, as follows:

> "A party against whom a claim * * * is asserted * * * may, *at any time* move *with or without supporting affidavits* for a summary judgment in his favor as to all or any part thereof." (Emphasis added.)

Rule 56(c) provides in part, as follows:

> "The motion shall be served at least 10 days before the time for hearing. *The adverse party prior to the day of hearing may serve opposing affidavits.* * * *" (Emphasis added.)

Appellant, pursuant to the provisions of Rule 56(c), had a clear opportunity to file an affidavit setting forth that he intended to *change* his testimony as it appeared in the "Transcript of Evidence" or that certain of his testimony appearing in the "Transcript of Evidence" had been given as a result of an honest mistake and that he intended to correct it in specified particulars. That is the obvious purpose of the rule.

This court has assumed that the prior proceedings which took place before a "jury", which did not result in any verdict whatever, constituted a "trial" and that the proceeding instituted by the appellee for a summary judgment was a "new trial". The court has inadvertently forgotten or overlooked the following established premise that "Trial" has been defined as follows:

> "By the definition which has met with general approval, 'A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties it may be considered a trial.'
> * * *
> "* * * and it is stated that in order to constitute a trial disposition must be made of all the material issues raised by the pleadings. There must be such proceedings after joinder of issue upon the facts, as are so far determinative of the issues that final judgment is the appropriate judicial conclusion thereof. In other words, the trial is not complete until the jury has rendered its verdict, or in the event of a trial by the court without a jury, it is not complete until the decision of the court by written findings is made and filed, unless the filing of such a decision has been waived. * * *" 24 Cal. Jur. (Trial) §§ 2 and 3; pp. 716-718.

The definition of "trial" as set forth in California Jurisprudence, *supra,* is in accord with the general and uniform definition thereof. (88 C.J.S. (Trial) § 1-§ 3, pp. 19-23.)

> "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee. It is seen that several elements are involved in this code definition, viz.: (1) a re-examination of an issue of fact: (2) re-examination in the same court; (3) re-examination after a trial and decision. The definition refers to the trials and decisions of the issues of fact in civil actions and proceedings—issues raised by ordinary pleadings—and has no reference to decisions of questions of fact on motions; or to collateral matters not put in issue by the pleadings. The 'decision' mentioned in the statute is that which was given upon the original trial of the questions of fact, and upon which the judgment is to be entered. It includes the facts found." 20 Cal. Jur. (New Trial) § 2, pp. 8-9.

The definition of "new trial" in California Jurisprudence, *supra,* is in accord with the general and uniform definition thereof, (66 C.J.S. (New Trial)) § 1, pp. 61-66.

This court, in the instant case, has stated:

> "The seaman may testify differently or correct the testimony given by him at the first trial, when questioned about it. The jury may listen to the testimony given in the trial before it and any new version, may, of course, be attacked by asking the seaman to explain his former statements, but after all is said and done, the jury decides upon its estimate of the whole evidence adduced to it in the new trial as it values it in the attendant circumstances including the credence it accords the witness." (Printed Opinion, pp. 6-7.)

Keeping in mind the premise that there was no "trial" and that the motion for a summary judgment was not a

"new trial" it is respectfully submitted that the statement of the Court last hereinabove quoted would make it utterly impossible for any United States District Court to grant a motion for a summary judgment. If the mere fact that it may be *surmised* that one of the parties involved in a motion for a summary judgment *might* in a formal trial of issues of fact before a court or jury amend, change (deliberately or honestly), modify or attempt to explain or put a different light upon testimony which he has theretofore given either in the form of oral testimony during a former mistrial or in a formal deposition or in documentary evidence which has been submitted to the trial court on a motion for a summary judgment as the only evidence within the knowledge of or available to the parties or either of them up to the instant the trial court rules upon the motion for a summary judgment, *such surmised possibilities* would effectually *preclude any trial court from ever granting any motion for a summary judgment.*

An examination of Rules 38-59, inclusive, Rules of Civil Procedure, will demonstrate that in the promulgation of said rules the United States Supreme Court recognized the following propositions: that there is no *"trial"* until a verdict is rendered and entered in the Civil Docket or the Trial Court shall find the facts "specially and state separately the conclusions of law thereof and direct the entry of the appropriate judgment"; and that there is no *"new trial"* pursuant to the Rules of Civil Procedure unless the verdict of a jury is set aside or the findings of fact and conclusions of law are set aside on motion for a new trial.

Regardless of what this court may conclude with reference to the true definition of "trial" or "new trial", there was no judgment rendered in the instant case in the trial court at any time up until the trial judge granted the appellee's

motion for a summary judgment. Rule 56(b) provides in direct, clear and concise language that the appellee in this case was entitled "at any time" to move "with or without supporting affidavits" for a summary judgment in its favor. A motion made after a mistrial had occurred is not precluded, but is specifically permitted by the phrase "at *any* time" set forth in the rule.

If the language last quoted from the printed Opinion was not intended by this court to have general application to all motions for a summary judgment but only to those wherein one of the parties happened to be employed as a seaman by the other party at the time the claim asserted by the seaman is alleged to have accrued, then this court-created exception to the general rule is clearly unconstitutional. The Rules of Civil Procedure are applicable alike to *every* litigant who is a party to *any* action in *any* federal court.

The Rules of Civil Procedure are therefore applicable to and binding upon the appellant.

As is completely developed in a subsequent subdivision of this petition, any court-created or legislative exception to a general rule may be so arbitrarily discriminatory as to be void for the reason that it is prohibited by the due process of law clause of the Fifth Amendment.

This court states: "The main question on appeal is: Did the trial judge, in the circumstances obtaining here, have the power to decide that there were no unresolved genuine issues in the case?" (Printed Opinion, bottom of page 2.)

Comment A: Appellee contends that the main question on appeal is as follows: Does it affirmatively appear on the face of the record on appeal, consisting of the "Transcript of Record" filed May 21, 1954, that the trial court committed any error in deciding that there was no genuine

issue of material fact relevant to the validity of the release; and that there was no genuine issue of material fact relevant to the contention of the appellee that the appellant ratified the contract of release by retaining the consideration and failing to return or offer to return any part or portion of the consideration?

Comment B: Does the "Statement of the Case", started in the middle of page 3 of the Opening Brief for Appellant, and concluded at the bottom of page 5 thereof, or the Specification of Errors, designated "Assignment of Errors", page 6 of said Brief, or the summary of argument, designated "Outline of Argument", page 7 of said Brief, respectively, present succinctly or at all or set out separately or particularly any contention to the effect that the trial court committed error in determining, as a matter of law, that there were no genuine issues of material fact relevant to the ultimate fact of the validity of the release or relevant to the determination of the ultimate fact of the defense based upon the doctrine of ratification; or that the trial court committed error, justifying a reversal, simply and solely because it used and considered the exhibits and the "Transcript of the Evidence" adduced before and in the presence of the trial judge during the mistrial as part of the bases upon which the trial court rendered a summary judgment in favor of the appellee?

Appellee contends that the opening "Brief for Appellant" does not contain any such required elements; and that, therefore, there is nothing for this court to review in its capacity as an appellate tribunal.

> "Appellee-defendant's notice of motion and the motion for a summary judgment refer exclusively to the validity of the release. The motion sets out, without affidavit, and without recital of the record and without inclusion

of the evidence given before the jury which failed to reach a verdict that: 'the evidence given at the trial was without dispute that: [then follows nine numbered statements which counsel has deduced from the evidence as established facts.]'

The motion ends with the following paragraph:

'CONCLUSION

'In view of the above uncontroverted facts given in sworn testimony at the trial or set out in exhibits introduced into evidence, there can be no question but that the release is valid as a matter of law; that there is no question of fact to go to the jury; and that defendant, American Hawaiian Steamship Co., a corporation, should have a summary judgment in its favor.'" (Top half, page 3, Printed Opinion.)

Comment A: Rule 7(b), Rules of Civil Procedure, reads as follows:

"(b) Motions and Other Papers.

"(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

"(2) The rules applicable to captions, signing and other matters of forms of pleadings apply to all motions and other papers provided for by these rules."

"A party against whom a claim, * * * is asserted * * * may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." (Rule 56(b), Rules of Civil Procedure.)

Comment B: There is, therefore, no requirement that the motion be accompanied by an affidavit or that there be a

"recital of the record" or that there be an "inclusion of the evidence given before a jury which failed to reach a verdict". The motion in the instant case was made in writing and stated with particularity the grounds therefor, to wit:

> "That there is no genuine issue as to any material fact and that * * * the defendant is entitled to judgment as a matter of law." (Tr. Rec. p. 22, ll. 14-16.)

The motion set forth the relief or order sought, as follows:

> "Defendant, American Hawaiian Steamship Co., a corporation, hereby moves the court for a summary judgment in its favor as to all of the claims sought by the plaintiff in the above entitled action * * *". (Tr. Rec. p. 22, ll. 11-14.)

Comment C: Rule 3(d), local rules of the United States District Court for the Southern District of California, promulgated by the judges of said court with unquestionable authority pursuant to Rule 83, Rules of Civil Procedure, requires that "there shall be served and filed with the *Notice of Motion* or other application and as a part thereof, * * * a brief, but complete, written statement of all reasons in support thereof, together with a Memorandum of the Points and Authorities upon which the moving party will rely. Each party *opposing* the motion or other application *shall* (A) within five days after service of the notice thereof upon him, serve and file a brief, but complete written statement of all reasons in opposition thereto and an answering memorandum of points and authorities, or a written statement that he will not oppose said motion, and (B) not later than one day before the hearing, serve and file copies of all * * * documentary evidence upon which he intends to rely.

* * * * * * *

> "* * * in the event an adverse party fails to file the instruments and memorandum of points and authorities provided to be filed under this rule, such failure

> *shall* be deemed to constitute a consent to the * * * granting of said motion or other application." (Rule 3(d), Rules, U. S. District Court, Southern District of California; Emphasis added.)

The appellant did not serve or file "a brief, complete, written statement of all reasons in opposition" to the granting of the motion for a summary judgment. In fact the transcript of record fails to show that the appellant served or filed any written statement, brief or complete or otherwise, of reasons in opposition to the motion.

Comment D: The nine numbered statements referred to, but not set forth in the opinion, were set forth in the Memorandum of Points and Authorities in compliance with the local rule which required the appellee to serve and file with the *Notice of Motion* "a brief, but complete, written statement of all reasons in support thereof." In addition to the nine numbered reasons in support of the motion, the "conclusion" set forth an additional and comprehensive statement of reasons in support of the motion as follows:

> "In view of the above uncontroverted facts given in sworn testimony at the trial or set out in exhibits introduced into evidence, there can be no question but that *the release is valid as a matter of law; that there is no question of fact to go to the jury;* and that defendant, * * *, should have a summary judgment in its favor." (Tr. Rec. p. 29, ll. 5-11.)

The *motion* did not end with the paragraph entitled "Conclusion" as stated by the court in its Opinion. The "Conclusion" was part of the reasons in suport of the motion.

> "It is not contended that the 'pleadings' in the case show there are no 'genuine issues'. There are no 'depositions', or 'affidavits' filed with the motion: and there

are no 'admissions' set up in the motion." (Printed Opinion, bottom of page 3.)

Comment A: The fact that the pleadings in the action raise issues of fact is immaterial on a motion for a summary judgment. If the rule were otherwise a summary judgment could not be rendered in any case where the pleadings raised issues of fact. If a complaint does not contain simple, concise and direct averments showing that the pleader *is* entitled to relief (Rule 8(a)(2); (e)(1), Rules of Civil Procedure.) the applicable remedy is a motion to dismiss pursuant to Rule 12, Rules of Civil Procedure.

> "The court must look beyond the pleadings and determine whether there is a genuine issue of material fact to be tried." (*Griffith v. Wm. Penn Broadcasting Co.*, 4 F.R.D. 475, 467.)

The decision in the *Griffin* case was cited as authority by this court near the bottom of page 9, printed Opinion. The objective of a motion for summary judgment is to separate the formal from the substantial issues raised by the pleadings. (*Walling v. Fairmont Creamery Co.*, 139 F. 2d 318.)

> "The purpose of the procedure, Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A., providing for the rendering of summary judgment is to dispose of cases where there is no genuine issue of fact even though an issue may be raised formally by the pleadings." (*Koepke v. Fontecchio,* (9th Cir.) 177 F. 2d 125, 127.)

The court examines evidence on a motion for summary judgment, not to decide any issue of facts which may be presented, but to discover if any real issue exists. (*Sprague v. Vogt,* 150 F. 2d 795.)

This rule contemplates that the District Judge shall take the pleadings as they have been shaped to see what issues of fact they make and then shall consider the depositions and admissions on file together with the affidavits to see if any such issues are real and genuine, and if they are not, judgment is given without further trial. (*Town of River Junction v. Maryland Casualty Co.,* 110 F. 2d 278, cert. denied, 310 U.S. 634, 84 L. ed. 1404.)

On application for summary judgment, the formal issues presented by the pleadings are not controlling, and the court must ascertain from an examination of the proof submitted whether a substantial triable issue of fact exists. (*Edward B. Marks Music Corp. v. Stasny Music Corp.,* 1 F.R.D. 720.)

A genuine factual issue is not raised merely by the formal allegations of pleadings, and if the District Court is satisfied that the facts in the case, as disclosed by pleadings, affidavits, admissions, depositions *and other matters considered,* are such that it would be required upon a trial of the case to direct a verdict for the moving party, no genuine issue of material fact exists and summary judgment should be granted. (*Pool v. Gillison,* 15 F.R.D. 194.)

Comment B: No rule set forth in the Rules of Civil Procedure requires a deposition or an affidavit to be filed with the motion. Rule 56(c), Rules of Civil Procedure, refers to "the pleadings, depositions, and admissions *on file*" at the time the motion for summary judgment is actually presented to, considered and ruled upon by the trial court. It is at *that* time, not the time when the written motion was served and filed, that Rule 56(c) refers to.

Comment C: The "Transcript of Record" shows that depositions were on file at the time the motion was served and filed and at the time the motion was presented to, considered and ruled upon by the trial court.

"3/23/53 FLD depos of Carl William Hamilton" (middle of page 66, Tr. Rec.)
"5/8/53 FLD deposn of Hoyle J. Welch tkn 4/30/53" (bottom of page 66, Tr. Rec.)
"1/2/54 * * * FLD exbs & list thereof. Ent ord deposns be opened. * * *" (Tr. Rec. p. 67, ll. 12-13.)

The "Findings of Fact" by a recital show that the *plaintiff's* deposition was taken on October 27, 1952. (Tr. Rec. p. 38, ll. 9-10.)

The "Supplemental Transcript of Record", page 3, line 3, contains the following statement of the trial judge: "We *have* a *transcript of the evidence.*" This statement was made on February 15, 1954, and it establishes as a fact that at said time, prior to the serving or filing of the motion for a summary judgment, "a transcript of the evidence" was a part of the files and records of the case.

In the case of *Whitaker v. Coleman,* 115 F.2d 305 also cited by this court near the bottom of page 9, printed Opinion, the court held that where a party at a hearing under the summary judgment procedure instituted by his opponent proffered a transcript of testimony at a former trial, arising out of a prosecution under the state law on a manslaughter charge, which apprised the judge that there was relevant evidence which such party could and would tender on a trial before a jury on a fact issue determinative of the litigation, the granting of a summary judgment against said party was error regardless of any defects in the certification and presentation of said transcript.

It seems obvious, and appellee so contends, that if such transcript of testimony is admissible for the purpose of showing the trial court that there was relevant evidence which when offered would raise a genuine issue of material fact, the "Transcript of evidence" referred to by the trial

court in the instant case was also a proper matter to be considered by the trial court.

In addition to the foregoing observation, Rule 43(e) Rules of Civil Procedure provides as follows:

> "When a motion is based on facts not appearing of record, the court may hear the matters on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

The foregoing rule specifically authorized the trial court to consider the oral testimony that he had heard and which had been reduced to written form in the "Transcript of the Evidence".

Furthermore, the "Transcript of the Evidence", if properly certified by the official reporter, comes within the ordinarily understood definitions of the word "deposition". (26 C.J.S., 807, § 1. Law Dictionary, Ballentine; Anderson's Law Dictionary; Words and Phrases, Annotated.)

Comment D: There are "admissions" shown in the moving papers. At the bottom of the release, the following appears:

> "THIS IS A GENERAL RELEASE
> "I have read and understand the above. * * * Adrian Guerrero"

This affirmative written statement, *in the handwriting of the appellant,* and written at the same time that he placed his signature on the release directly below such affirmative statement, is certainly an admission that he had read and understood the contents of the document *and* that it was "a general release". If a request that the appellant admit that he had read and understood the release before he executed it had been directed to the appellant pursuant to Rule 36, Rules of Civil Procedure, and he had answered: "I did read and understand the general release which I

executed" would such admission be any more of an admission than his affirmative statement, in his own handwriting, at the bottom of the release? Appellee respectfully submits that the affirmative statement of the appellant is at least the equivalent of an admission.

The said release was on file as an exhibit at the time the summary judgment was rendered. It was quoted *verbatim* in the proposed findings then on file. It was an exhibit in the file.

In addition the appellee claimed in the brief for appellee and still contends "that the failure of the appellant to serve and file a brief, but complete, written statement of all reasons in opposition" to the motion constituted an admission of the seventeen elements set forth on pages 23-26 of the "Brief for Appellee".

The "Transcript of Record" does not affirmatively show that the trial court did *not* in granting the motion for a summary judgment assume that the facts as claimed by the appellee were admitted to exist without controversy. Appellee asserts, with confidence, that the rules governing the consideration and decision of a case by an appellate tribunal, requires such tribunal to presume the existence of all things which will support the judgment unless the contrary affirmatively appears from an inspection of the face of the record on appeal. There is absolutely nothing in the "Transcript of Record" or the "Supplemental Transcript of Record" which affirmatively shows that at the time the trial judge orally granted the motion or signed the findings of fact, conclusions of law and judgment he did *not* assume that the facts as claimed by the appellee in its proposed findings of fact were admitted to exist without controversy because of the fact that there was a failure on the part of the appellee to controvert any thereof in any statement

filed in opposition to the motion. These "admissions" were on file on March 8, 1954 when the trial judge granted the motion for summary judgment by oral order and also on March 26, 1954, when the trial judge signed the "Findings of Fact", "Conclusions of Law" and the "Judgment".

What went on in the mind of the trial judge on and between March 8, 1954 and March 28, 1954 as to assumptions is not affirmatively revealed on the face of the record on appeal. The act of assuming anything is a mental process.

Ground Four

It is respectfully contended that Ground Four of the Petition is in all probability sufficiently argued in ground "4" (Grounds of Petition for Rehearing), pp. 12-14, *supra*. In any event the subject of Ground Four has been brought to the attention of the Court.

The only additional argument which might be necessary is to call the attention of this Court to the proposition that the statute pursuant to which the Supreme Court was authorized to promulgate the Rules of Civil Procedure and the plain language set forth in the rules with reference to motions in general, motions for a summary judgment, and the *form* in which the available evidence is required to be exhibited to the Trial Court for its examination in determining whether a motion for a summary judgment should or should not be granted must be equally applied to all litigants regardless of occupation or economic status. Any attempt of a Court, or even the Congress, to introduce an arbitrarily discriminatory exception to the general applicability of the rules and to provide by such exception that Rule 56, F.R.C.P. requires different treatment for seamen than it does for any other litigant would be clearly unconstitutional.

Ground Five

The judgment of this Court with reference to the lack of applicability of the general rules with respect to rescission and ratification, holding that such general rules are not applicable to a seaman solely because of his occupational status is in conflict with the following decisions: *Panama Agencies Co. v. Franco,* 111 F.2d 263; *Reinhardt v. Weyerhaeuser Timber Co.,* 144 F.2d 278; *Graham v. Atchison T. & S. F. Ry. Co.,* 176 F.2d 319; *Callen v. Pennsylvania R. Co.,* 332 U.S. 625; 92 L.ed. 242. The conflict between the judgment of this Court and the Federal Rules of Civil Procedure; the rules on appeal promulgated by this Court; and the due process of law clause of the Fifth Amendment, Constitution of the United States, has already been argued in preceding subdivisions of this petition; and will be referred to in the presentation of a point to be hereinafter discussed.

Ground Six

The mandate of the Fifth Amendment, Constitution of the United States that "no person shall * * * be deprived of * * * property, without due process of law" is binding upon and limits the power of all branches of the government of the United States, including the federal courts.

The decision relied upon by this court in support of its statement "that the burden is on the employer to show the validity of the release" is in the case of *Garrett v. Moore-McCormack,* 317 U.S. 239; 87 L.ed. 239. The "burden of proof rule" as stated by the Supreme Court is as follows:

> "We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with *full* understanding of his rights. The *adequacy* of the consideration and the

nature of the *medical and legal* advice *available* to the seaman at *the* time of signing the release are relevant to an appraisal of this understanding." (*Garrett v. Moore-McCormack,* 317 U.S. 239, 248; 87 L.ed. 239, 245; Emphasis added.)

With respect to the Jones Act, the Supreme Court has stated as follows:

"The Act thus made applicable to seamen injured in the course of their employment the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60, which gives to railroad employees a right of recovery for injuries resulting from the negligence of their employer, its agents or employees."

O'Donnell v. Great Lakes, etc. Co., 318 U.S. 36, 38-39; 87 L.ed. 596, 599.

To the same effect, please see *De Zon v. American President Lines, Ltd.,* 318 U.S. 660-675; 87 L.ed. 1065, 1069.

Legislation pursuant to which an existing statute or portion thereof is adopted by reference thereto is common practice.

Therefore, the basic factual bases of the statutory cause of action created by the Jones Act are those portions of the Federal Employers' Liability Act which *modify or extend* the *common law right or remedy* in cases of personal injury to railway employees. In other words, all seamen and all interstate railway employees have been placed in an *identical* category by the Congress.

Prior to the enactment of the Federal Employers' Liability Act all railroad companies, interstate and intrastate alike, possessed the right to assert all of the defenses to actions for damages for personal injury theretofore recognized by the common-law. These defenses were: contributory negligence; assumption of risk of all obvious dangers

and assumption of all risk of injury proximately resulting from the negligence of a fellow servant. The said railroad employers were, in any action commenced against them for damages for personal injuries, also entitled to plead as a special defense any contract pursuant to which any employee had released and discharged such railroad of and from all claims for damages by reason of bodily injuries suffered as a proximate result of claimed actionable negligence on the part of the employer. The sole burden of proving by a preponderance of evidence that such release was void was always imposed upon the plaintiff and the plaintiff in such action was barred, as a matter of law, from maintaining such action after the pleading of such release by the defendant unless he could prove by affirmative evidence that the release was void *ab initio* or that it was voidable at his option and he had exercised the option by rescinding the same and restoring or offering to restore the consideration which had been paid to him therefor. In *such* cases, whenever the release involved was not claimed to be void but merely voidable, ratification of the voidable contract of release by a retention of the consideration was also a complete bar to recovery, regardless of whether or not the injured employee had good, fair or poor proof of actionable negligence available to him in the first instance and regardless of whether his injuries were slight, moderate or severe. The foregoing contentions of appellee-petitioner as to *voidable* releases are intended to refer to railway employees who were *sui juris* at the time of the execution of the release involved.

It must be presumed that the Congress had all of these defenses in mind when it originally enacted the Federal Employers' Liability Act and when it amended the same

from time to time up to and including the date of the enactment of the Jones Act on June 5, 1920.

It must also be presumed that the Congress knew what it was doing when it provided, with reference to the *statutory* cause of action created by the Jones Act in favor of seamen suffering personal injury in the course of their employment, that "*all* statutes of the United States *modifying or extending* the common-law right or remedy in cases of personal injury to railway employees *shall* apply; * * *" It must also be presumed that the Congress had in mind and took cognizance of the extent to which the old defenses theretofore available to interstate railroad companies in a common law action for damages had been modified.

The Congress must be presumed to have been cognizant of the following: That in suits in equity to rescind a contract of release the affirmative burden is without exception imposed upon the plaintiff to show by a preponderance of all the evidence that the release is void *ab initio* or that equitable grounds of rescission exist; and that all conditions precedent to an involuntary rescission have been complied with; that when a release is pleaded by a defendant in an action at law the defendant establishes the *prima facie* validity of the release by proving that the plaintiff actually executed the same and received therefor a consideration in lawful money of the United States; and that unless the releasor *controverts* such *prima facie* defense by the introduction of *affirmative* evidence, said defense is complete and there is nothing more to the case but to enter final judgment in favor of the defendant.

A general release is a common-law *right of* defense. The common-law has always furnished a *remedy* to protect such right of defense. Nowhere in the "Jones Act", a *statutory* cause of action, does the Congress use *any* language indi-

cating directly or indirectly that it had the slightest intention to modify or extend said common-law right of defense or the common-law remedy with respect thereto.

Appellee-petitioner, in the "Brief for Appellee" at page 21 cited the case of *Callen v. Pa. R. Co.,* 332 U.S. 625, 630-631, 92 L.ed. 242, 246. This case was cited in response to the contention of the appellant that by reason of Title 45, U.S. Code section 55 the release executed by appellant was *void.*

In view of the fact that appellee in its brief did not specifically explain what it contended was decided by the Supreme Court with reference to the subject of burden of proof and did not quote everything said by the Supreme Court with reference to that subject, it will do so now, as follows:

> "We are urged, however, to decide in this case that the release was properly disregarded by the trial court upon the ground that the burden should not be on one who attacks a release, to show grounds of mutual mistake or fraud, but should rest upon the one who pleads such a contract, to prove the absence of those grounds. It is not contended that this is or ever has been the law; rather, it is contended that it should be the law, at least as to railroad cases. The *amicus* brief puts it that 'We ask that the burden of establishing the validity of a release taken from a railroad employee under the Federal Employers' Liability Act be placed on the railroad, and that, where but a nominal sum has been paid, which is less than or even equal to only the wages lost, that fact of itself be held to be evidence of at least a mistake of fact, if not presumed fraud, since the railroad possesses superior facilities for determining the extent of the injuries * * *' Considerable reliance is placed upon a concurring opinion in the Court of Appeals for the Second Circuit in Ricketts v. Pennsylvania R. Co., 153 F2d 757, 760, 164 ALR 387. However

persuasive the arguments there stated may be that inequality of bargining power might well justify a change in the law, they are also a frank recognition that the Congress has made no such change. *An amendment of this character is for the Congress to consider rather than for the courts to introduce.* If the Congress were to adopt a policy depriving settlements of litigation of their *prima facie validity,* it might also make compensation for injuries more certain and the amounts thereof less speculative. But until the *Congress* changes the *statutory* plan, the releases of railroad employees stand on the *same* basis as the releases of *others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.*

"The plaintiff has also contended that this release violates § 5 of the Federal Employers' Liability Act which provides that any contract to enable any common carrier to 'exempt itself from any liability created by this chapter shall to that extent be void.' 35 Stat. 66, c 149, 45 USCA § 55, 10A FCA title 45, § 55. It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." (Emphasis added.)

Callen v. Pennsylvania R. Co., 332 U.S. 625, 629-631; 92 L.ed. 242, 246.

The Supreme Court clearly held that any exception to the general rule with reference to the burden of establishing the validity of a release, "is for the Congress to consider *rather than for the courts to introduce.*" The holding is also clear that "until Congress changes the *statutory* plan, the releases

of railroad employees stand on the *same* basis as the releases of *others.*"

This clear language is just as applicable to releases of maritime employees as it is to railroad employees and should be enough to demonstrate that the burden of proof rule *introduced* by the Supreme Court in the *Garrett* case is invalid, *if* the court intended to enunciate a general rule applicable to all releases executed by seamen.

If the Supreme Court possessed power, pursuant to the Constitution of the United States, to establish by judicial fiat the burden of proof rule with reference to the validity of a release executed by a person who happened to be a seaman, at the time he sustained bodily injuries upon which he later predicated a claim for damages against the company which *was* his employer at said time, then there can be no question about the proposition that the standard relative to burden of proof is as stated by the Supreme Court in the *Garrett* case. Appellee has at no time *conceded* the premise "that the burden is on the employer to show the validity of the release." Specifically, appellee has at no time conceded that the burden of proof rule stated by the Supreme Court was within the judicial power vested in it by the constitution.

It does not appear from anything stated by the Supreme Court in the course of the decision in the *Garrett* case that there was any contention that there was an absence of judicial power to establish the "court-made" rule as to burden of proof in reference to a "seaman's" release. The mere fact that the Supreme Court and the attorneys involved in that case impliedly assumed and conceded, respectively, that the Court was lawfully authorized to create such rule is of no importance, and does not reach the dignity of *stare decisis,* when the constitutional point is directly raised in a subsequent case.

The contention that the "court-made" rule is void because it is in contravention of the due process of law clause of the Fifth Amendment is hereby directly raised. Appellee respectfully contends that this Court cannot predicate an opinion reversing the judgment of the trial court upon the ground that the "court-made" burden of proof rule announced in the *Garrett* case is valid *or applicable to the record on appeal in the case at bar.* The burden of proof rule of the *Garrett* case, if intended to be applicable to all releases executed by seamen, is bottomed squarely and solely upon the premise that Garrett happened to be employed as a seaman on and a member of a crew of a vessel operated by Moore-McCormack Company at the time he suffered the bodily injuries which were the subject matter of the release.

The *"subject-matter"* of all contracts pursuant to which an injured person, for a valuable consideration, releases the claimed tort feasor is the same whether the injury which is the basis of the claim for damages occurred on land or on sea. The general law applicable to the validity of releases executed by persons in the full possession of normal faculties is not concerned with the occupational status of the releasor at *the* time he sustained the injury or with the fact that at *said* time the relationship of employer and employee existed between the claimed tort feasor and the releasor. That is not a *confidential* relationship. The law does not refer to releases as a "brakeman's release", "carpenter's release", "electrician's release", "engineer's release", "conductor's release", "chambermaid's release", "cook's release", etc. There is no logical basis for characterizing the release signed by Garrett or the release signed by Guerrero as "a *seaman's* release". When a man has suffered an injury while working as a seaman and he later executes a contract of release, he is not executing the release *as* a

"seaman". He executes the release in his status as an individual pursuant to his constitutional right to make a valid and binding contract, upon the *same* basis and subject to the *same* rules which are applicable to all adult persons in the full possession of normal faculties of perception. Every release is a contract. A person *sui juris* who executes a *voidable* release is authorized to rescind the same upon well established grounds but must do so promptly after discovery of the existence of one or more of the recognized bases of rescission and he must at that time restore or offer to restore the consideration. No person, whether he happens to make his living as a seaman or in the pursuit or any other vocation, has the right to retain the consideration, or any part thereof, which he received, unless he received it in consideration of releasing a claim for damages or some other chose in action as to which he would have been entitled to recover a judgment as a matter of *absolute* right. In such latter case the courts rightfully hold that if the releasor was fraudulently induced to execute a release which literally construed included claims which he was fraudulently led to believe were not the subject of the release, then he is entitled to retain the consideration and need not return it as a condition precedent to the maintenance of a suit for damages. These rules apply to all persons alike and in every such case the burden of proof is imposed exclusively upon the releasor to show by a preponderance of evidence the existence of one or more of the recognized bases pursuant to which a court or jury may declare such release *void*. If such release is merely *voidable,* the consideration must be returned or at least offered to the releasee before or at the time the releasor indicates an intention to disavow it. This rule applies to *all* adult persons in the possession of normal faculties of perception. (*Callen v. Pa. R. Co.,* 332 U.S. 625, 92 L.ed. 242.)

What the Supreme Court of the United States did in the *Garrett* case is to erect an arbitrary discrimination in favor of a single specie of the genus "releasor" and an arbitrary discrimination against a single specie of the genus "employer".

It is respectfully contended that the Supreme Court of the United States was without lawful power to do this. This "court-made" rule is no less vulnerable to attack upon the ground that it contravenes the due process clause of the Fifth Amendment than would be an act of the Congress to the same effect.

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of *equal protection* and due process, both stemming from our American ideal of fairness, are *not* mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and, therefore, we do not imply that the two are always interchangeable phrases, *but, as this court has recognized, discrimination may be so unjustifiable as to be violative of due process.*
>
> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.
>
> * * * * * * *
>
> "Although the court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law *extends* to the *full range of conduct which the individual is free to pursue,* and it *cannot* be restricted *except for a proper governmental objective.*" (Emphasis added.)
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> *Bolling, et al. v. Sharpe, et al.,* 347 U.S. 497, 499-500, 98 L.ed. 884, 886-887.

Appellee contends that classifications based solely upon an occupational status must likewise be scrutinized with particular care, since they are also contrary to our traditions and hence constitutionally suspect.

In support of its statement that "discrimination may be so unjustifiable as to be violative of due process" the Supreme Court cites *Detroit Bank v. United States,* 317 U.S. 329, 87 L.ed. 304; *Currin v. Wallace,* 306 U.S. 1, 13, 14, 83 L.ed. 441, 450, 451; and *Steward Machine Co. v. Davis,* 301 U.S. 558, 585, 81 L.ed. 1279, 1290.

The eldest case is *Steward Machine Co. v. Davis.* The basic question involved in that case was the validity of the tax imposed by the Social Security Act on employers of eight or more. (301 U.S. 548, 573; 81 L.ed. 1279, 1283.)

The second eldest case is *Currin v. Wallace.* That case involved the following situation: "Plaintiff, Tobacco Warehousemen and Auctioneers in Oxford, North Carolina, seek a declaratory judgment that the Tobacco Inspection Act of August 23, 1935, is unconstitutional and an injunction against its enforcement." (306 U.S. 1, 5; 83 L.ed. 441, 445-446.)

The latest case is *Detroit Bank v. United States.* In that case the questions involved were stated by the court as follows:

> "The questions for decision are:
>
> (1) Whether the lien for federal estate taxes authorized by § 416(a) of the Revenue Act of (February 26) 1926, 44 Stat. at L. 9, 80, 26 USCA Int Rev Acts 1940 ed. p. 253, attaches to the interest of the decedent in an estate by the entirety.
>
> "(2) Whether the lien is required to be recorded under the provisions of Rev Stat § 3186, as amended, in order to give it superiority to the lien of a mortgagee who acquired his mortgage for value in good faith without knowledge of the tax lien.

"(3) Whether § 315(a), so applied as to give the lien superiority over such subsequent mortgages, offends the Fifth Amendment." (*Detroit Bank v. United States,* 317 U.S. 329, 330-331; 87 L. ed. 304, 307.)

It is thus obvious that none of the cases cited by the Supreme Court in the *Bolling* case in support of its statement that "as this court has recognized, discrimination may be so unjustifiable as to be violative of due process' was a case involving a claim of arbitrary discrimination upon the ground of "race". It is respectfully submitted that this should be enough to convince this Court that any rule with reference to burden of proof which is predicated solely and exclusively upon the occupational status of one of the parties is an arbitrary discrimination which is likewise so unjustifiable as to be violative of the due process of law clause, Fifth Amendment, Constitution of the United States.

Although the *Bolling* case (supra) involved "the validity of segregation in the public schools of the District of Columbia" the basic principle of law underlying the decision of the Supreme Court is also applicable to the question involved in this subdivision of this petition. The segregation of negroes from whites in the public school system of any state is only another name for arbitrary discrimination. In other words, out of all the various races attending public schools segregation of negroes was made on the sole premise that they were negroes. This is no different than segregating men who when employed make their living as seamen from other workmen in other industries, all of whom possess normal faculties of perception, or than segregating persons who happen to be the employers of *such* "seamen" at the time they may have suffered an injury from all other employers or ex-employers of workmen in all other industries.

The Supreme Court of the United States was and is

without lawful power to create a binding rule of law that in *every* case where a release is executed by a person whose occupation is that of "seaman", the burden is upon the person who pleads a release executed by such person to show by *affirmative* evidence that it was executed freely, without deception or coercion, and that the "seaman" executed the release with full understanding of his "rights". The "due process of law" clause of the Fifth Amendment prevents the Supreme Court of the United States or any other court from creating any such rule.

The court-made rule refers specifically to the question of burden of proof but it is based upon the assumed premise that *solely* by reason of the occupational status of the *releasor* and the existence of an employer-employee relationship upon the date of the *accrual* of his claim for damages all of the presumptions against its validity are justified and that, therefore, the *releasee* must not only controvert but *overcome* the presumptions. These court-created presumptions are unconstitutional for the same reasons that they would be if the Congress had established them by statute.

> "The rules of evidence, however, are established not alone by the courts but by the legislature. * * * But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of the state legislature to make proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated.
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> * * *
>
> Under our decisions, a *statutory* presumption *cannot* be sustained if there be *no rational connection* between *the* fact proved and *the* ultimate fact *presumed*, if the inference of the one from proof of the other is arbitrary because of lack of connection between the

two in *common experience.* This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." (Emphasis added.)

Tot v. United States, 319 U.S. 463, 467, 468; 87 L. ed. 1519, 1524.

A statute or court-made rule creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the guarantee of the Constitution that no person shall be deprived of his or its property without due process of law, since legislative or judicial fiat may not take the place of fact in the judicial determination of issues involving substantial property rights. (*Western & A.R.R. v. Henderson,* 279 U.S. 639, 73 L. ed. 884; *Bandini Petroleum Co. v. Superior Court of California,* 284 U.S. 8, 76 L. ed. 136; 110 Cal. App. 123.)

Legislation (or court-made rule) that proof of one fact (or the conceded existence of a particular *occupational* status) shall constitute *prima facie* evidence of the main fact in issue violates the due process of law clause when the relation between *the* fact found and the presumption is not *clear and direct. (Adler v. Board of Education,* 342 U.S. 485, 96 L. ed. 517.)

The Supreme Court, in the *Garrett* case, impliedly limits the artificial erection of the well-nigh incontrovertible presumptions of invalidity to a single specie of contracts which a seaman has a lawful right to execute both under the constitution of the United States and the constitutions of the various states. The only specie of the genus "contract"

referred to in the "rule" is "a seaman's release". There are many contracts which a person who makes his living as a seaman may execute or may enter into with other persons. For example, if one seaman lends money to another seaman, while aboard a vessel on navigable waters of the United States, and the one who borrows the money executes a promissory note in favor of the other and acknowledges therein the receipt of the money which is the subject of the promissory note, is the promissory note presumptively invalid? If in the assumed case the seaman who borrowed the money and executed the promissory note repays the money and procures a receipt and release with reference thereto and the lender acknowledges on the face of the receipt the payment of the money and specifically releases the borrower of and from all claims and demands predicated upon the promissory note, what would be the rule with reference to the burden of proof if the seaman who had loaned the money brought suit against the one who had borrowed the money and the latter pleaded *in haec verba,* as his sole and only defense, the receipt and release which had been executed by the lender? Which one of them would have the burden of proving by a preponderance of evidence that the receipt and release was invalid upon one of the grounds recognized by statute or equitable principles as the bases of invalidity of a contract which is apparently lawful on its face? In view of the rule stated in the Garrett case, can a "seaman" execute a presumptively valid and binding mortgage or a presumptively valid and binding release of a claim for damages against a person who was *not his employer* at the time it accrued, arising out of an automobile accident suffered while the seaman is actually engaged in the course and scope of his employment as a seaman and member of the crew? If contracts of the type immediately hereinabove

specified are presumptively valid and binding upon every "seaman", upon what possible, reasonable or rational ground can a single specie of the entire genus "contract" be excised therefrom and the "court-made" rule of the Garrett case be applied exclusively to an *ex*-employer of an individual possessing normal faculties of perception who happened, at the time of the accrual of an alleged or claimed cause of action for damages, to be a seaman and member of the crew of a vessel owned or operated at said time by the *ex*-employer?

The release involved in the case at bar was not executed by appellant *as* a "seaman". At the time of the negotiations leading up to it and at the time of its execution, the appellant and appellee were legal *strangers*. The relationship of employer and employee had long since ceased to exist. No fiduciary or confidential relationship of any kind existed between the appellant and the appellee at *any* time, *including* the period when appellant was acting *as* a seaman and member of the crew of appellee's vessel.

The court-made "burden of proof" rule, *if* intended to apply to all releases executed by "seamen", is premised exclusively upon the single fact that *at the time* Garrett *sustained bodily injuries* he *was* a seaman and member of the crew of a Moore-McCormack Company vessel. Upon this fact alone, the Supreme Court by judicial fiat created the following conclusive presumption: The relationship between Garrett and Moore *at the time of the execution of the release* was equivalent to that of "guardian and ward" or "trustee and cestui"; and the following "disputable" presumptions: (1) That the release was not executed freely. 2. That it was procured by deception or coercion. 3. That it was executed by Garrett without a full understanding of his rights. 4. That the nature of the medical and legal

advice available to Garrett at the time he signed the release was not adequate to enable him to have a full understanding of his rights. 5. That the amount paid as a consideration, regardless of how much or little, was inadequate.

Assuming, without in the slightest degree conceding, that the language used by the United States Supreme Court is broad enough to apply the burden of proof rule enunciated therein to *all* cases involving seamen who have executed releases, it seems obvious that the court did not intend to do so.

What any court of appellate jurisdiction may have said with reference to any rule of law in a particular case must be read and understood in the light of the facts to which the rule of law was applied.

In *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 87 L. ed. 239, Garrett placed his signature on a full release for a consideration of $100. Garrett denied

> "that he had any knowledge of having signed such an instrument, (and) asserted that if his name appeared on it, his signature was obtained through fraud and misrepresentation and without 'legal, binding and valid consideration.'
>
> "The petitioner did execute a release for $100 * * *. His testimony was that his discussion with respondent's claim agent took place while he was under the influence of drugs taken to allay the pain of his injury. That he was threatened with imprisonment if he did not sign as directed and that he considered the $100 as payment of wages. The respondent's evidence was that the $100 was paid not for wages but to settle all claims grown out of the petitioner's injuries, that the petitioner had not appeared to be under the influence of drugs, and that no threats of any kind were made."
>
> *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 241; 87 L. ed. 239, 241.

Thus if Garrett's testimony was accepted by the jury in preference to that of the claims agent, the only contract which Garrett had made was a release with reference to wages. This was owing to him, as a matter of absolute right, whether the $100 was paid for wages actually earned or on account of wages to the end of the voyage. In that case, there would be no consideration whatever for the release of Garrett's claim for damages pursuant to the Jones Act.

If, in fact, the Moore-McCormack Co. did not actually owe the total sum of $100 on acount of wages, the difference between that amount and the total sum paid would not have validified the release insofar as it related to the claim for damages if the jury accepted his version that his signature was procured through fraud and misrepresentation, that he was under the influence of drugs at the time of signing the same and that he was threatened with imprisonment if he did not sign as directed. A finding by the jury in his favor with reference to these contentions would necessarily require an ultimate finding that he had not entered into the contract of release at all and that the act of executing it was induced by fraud, duress and coercion.

The opinion of the Supreme Court shows on its face that it was not called upon in that case to consider or decide, as a disputed question of law, the question of burden of proof which would have been applicable if Garrett's case had been tried on the admiralty side of a United States District Court.

> "Respondent made a motion for a new trial and judgment non obstante veredicto which under the Pennsylvania practice was submitted to the trial court en banc. That court gave judgment to the defendant non obstante veredicto, not upon an appraisal of disputed questions of fact concerning the accident, but because of a conclusion that petitioner had failed to sustain the

> burden of proof required under Pennsylvania law to invalidate the release. It conceded that 'in Admiralty cases, the responsibility is on the defendant to sustain a release rather than on a plaintiff to overcome it,' but concluded that since petitioner had chosen to bring his action in a state rather than in an admiralty court, his case must be governed by local, rather than admiralty principles."
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> *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 241-242; 87 L. ed. 239, 241-242.

Moore-McCormack Co. did not present to the Supreme Court in the *Garrett* case any *dispute* with reference to the *validity* of the so-called burden of proof "rule" in admiralty and maritime cases as it had been enunciated theretofore by federal courts in cases tried on the admiralty side of said courts. The only point submitted by the company to the Supreme Court for decision, as a disputed question of law in the *Garrett* case, was that the state courts of Pennsylvania should have applied the state rules with reference to burden of proof rather than what Moore-McCormack *conceded* was a valid burden of proof rule applicable to similar cases in the courts of admiralty. The real dispute submitted to the United States Supreme Court was not whether the so-called admiralty burden of proof rule was valid but whether it was a part of the substantive maritime law or merely an incident of procedure. The Supreme Court held that the admiralty rule which was conceded by Moore-McCormack Company to be valid was a part of the substantive admiralty law and therefore applicable to the trial of the action in the state court.

The decision of the Supreme Court, therefore, is not authoritative precedent for the proposition that the burden of proof rule theretofore enunciated by courts sitting

in admiralty was a valid exercise of the judicial function.

The mere fact that the Supreme Court recapitulated the "assumed" admiralty burden of proof rule with reference to releases in its opinion does not support a contention that it was *deciding* the *validity* of that rule as a *disputed question of law* in the case.

For the foregoing reasons it is obvious that the decision is not authoritative precedent in the instant case.

There are other valid reasons demonstrating that the decision in the *Garrett* case is not applicable to the issues of law involved in the instant case.

A motion for a summary judgment is in the same class as a motion for a directed verdict. "Burden of proof" is involved only when there is a trial of genuine issues of material fact before a duly constituted tribunal which has the power to resolve conflicts and thereupon decide the ultimate fact in issue. In order to prevail on a motion for a directed verdict the moving party is required to convince the trial court that the evidence is insufficient, as a matter of law, to support a verdict in favor of the adverse party. Such motion may be based upon the ground that the plaintiff has not made out a *prima facie* case or that evidence introduced in support of a special defense has not been controverted by any evidence, direct or indirect, introduced by the adverse party. A motion for a directed verdict cannot be lawfully granted if there is any genuine issue as to any material fact in issue. The only difference between a motion for a directed verdict and a motion for a summary judgment is that the latter motion is made without introducing evidence before a court and jury and going through what may be the useless formality of a "trial." The evidence available to each of the parties is made known to the judge of the trial court. If upon a consideration of the oral and documentary evidence

available to each of the parties it appears to the judge of the trial court, without resolving or attempting to resolve conflicts, that viewing all of it in the light most favorable to the plaintiff there would not be sufficient substantial evidence to support a verdict in his favor the trial court is not only authorized but required to render a summary judgment.

At the time of the execution of the release by Garrett he and his former employer were legal strangers. This salient fact was overlooked by the Court. Under these circumstances the court-made presumptions against the validity of a release executed by a person who, *when he worked,* happened to make his living as a seaman and member of the crew of a vessel, were and are arbitrarily discriminatory since there is no reasonable, clear or direct relation between the presumptions and the mere fact of occupational status. They are, therefore, in contravention of the Fifth Amendment which prohibits all agencies of the federal government, including the judicial branch, from depriving any person of his or its property rights without due process of law.

The mere fact that the Supreme Court has stated the rule, without also determining that it possessed power under the Constitution to do so in the face of a contention that it did not, does not amount to a decision that such rule is constitutional. Therefore the question of constitutionality hereby raised by the appellee is open for decision by this Court. It is a very serious and important question and should be considered and decided upon a rehearing.

Appellee contends that the decision of the Supreme Court which, in effect, *arbitrarily* places *all* "seamen" in a *non sui juris* category is in direct conflict with the due process clause of the Fifth Amendment. No recognized concept of

the bases of "judicial notice" will support it. There is no statute enacted by the Congress which supports it. There is no reasonable or logical ground upon which to premise a rule placing all adult "seamen" in a presumptively *non sui juris* status and at the same time recognizing that if the *identical* persons happened to work for a railroad the ordinary rules with reference to the burden of proof of the alleged invalidity of a release will prevail. Consistency is not always recognized by courts as one of the rules which should be taken into consideration in rendering decisions but it is still a virtue.

The Congress has enacted remedial legislation for the benefit of employees of interstate common carriers by railroad. The Jones Act by reference thereto adopts certain of those statutes. Each of the statutes was enacted for the purpose of conferring substantial benefits upon the men who work in the respective railroad and maritime fields. The courts have held many times that each of these statutes must be *liberally* construed in favor of the workers. The Congress has placed *all* of these workers in the *same general category* with respect to their rights of action for damages and the defenses which the employer may urge. There is, therefore, no *reasonable* ground upon which to differentiate between them with reference to burden of proof of *any* issue which may be raised by the pleadings in an action based upon either of these statutes. Any attempt to unreasonably and arbitrarily discriminate in reference to the burden of proof in a controversy involving the validity of releases signed by railroad workers and maritime workers is prohibited by the "due process of law" clause, Fifth Amendment.

There is no reasonable ground upon which to differentiate between a release executed by First Doe, a seaman; Second

Doe, a railroad brakeman; Third Doe, a carpenter; Fourth Doe, a bricklayer; Fifth Doe, a plumber; and Sixth Doe, an electrician, for the *sole* reason that their occupations are in different industrial fields. Let us assume that First Doe and Second Doe are *identical* twins in all respects, mental and physical, excepting that one works upon a vessel and the other works in a railroad yard. Upon what basis, other than one which is purely fictitious, arbitrary and capricious, can we reach the result that a release executed by one is presumptively valid but presumptively invalid when executed by the other? If John Doe happened to work for a corporation which operated a railroad and ships and sustained two separate injuries, one while working on a flat car as a brakeman and another while working for the same employer as a seaman and member of the crew of a vessel on navigable waters and for a valuable consideration executed separate releases with respect to each claim for damages against his former employer would the former employer be in the status of trustee as to the second claim and in an "at arm's length" status as to the first claim? The negative answer is obvious. Any attempt to declare by judicial fiat that the mere fact of occupational status as a seaman is sufficient to put his former employer in the status of trustee or to put *every* seaman in the category of persons who are *non sui juris* is arbitrary, unreasonable and in contravention of the "due process of law" clause of the Fifth Amendment, Constitution of the United States. The *arbitrary* discrimination between persons *in similar circumstances* is a denial of "due process of law." (*Wallace v. Currin,* 95 F. 2d 856; affirmed, sub-nom. *Currin v. Wallace,* 306 U.S. 1, 83 L.ed. 441; *Bolling v. Sharpe,* 347 U.S. 497, 98 L.ed. 884.)

There are at least several maritime unions in the United States. The officers and members of these unions are "sea-

men." Are the collective bargaining agreements executed by such unions and the operators of ships presumptively invalid for the sole reason that the members of the union and the officers who negotiate the contracts for and on behalf of the members are "seamen"? During the negotiations leading up to the execution of such collective bargaining agreements it is obvious that a vast majority of the members of the various unions are actually employed as seamen on the vessels being operated by the various employers. Are all of these collective bargaining agreements presumptively invalid with respect to *such* members of the union for the sole reason that they are seamen *actually* employed as such during the negotiations preceding and at the time of the execution of such contracts?

A release is nothing but a contract. The same is true with reference to a collective bargaining agreement. If the sole fact of occupational status as seamen is sufficient in and of itself to raise all of the presumptions hereinabove referred to in a case involving the validity of a release then exactly the same presumptions must be applied to a dispute concerning the binding effect of a collective bargaining agreement. The *same* "burden of proof" rule which is *lawfully* applicable to a dispute over the validity of a release must be applied to a dispute over the validity of such collective bargaining agreement. If the rule of the Garrett case is applicable to contracts of release involving an ex-employer of a "seaman" it should be applied with more vigor to a collective bargaining agreement negotiated and executed while the employer-employee relationship is in actual existence. Are the ship-operating employers of this nation now justified in refusing to negotiate or contract with the seamen as a class because the law provides that they do so at their peril and that the contract will not be binding on the

seamen unless the employers are able to prove by affirmative evidence, whenever its validity is in issue, that none of the recognized grounds upon which contracts can be rescinded in equity is available to the seamen? The mere statement of the question seems to demonstrate how silly and ridiculous an affirmative answer would be.

The statutes of the United States require the master of every vessel about to engage in a foreign or intercoastal voyage to enter into a written contract with all members of the crew. Are these contracts (shipping articles) presumptively invalid and of no binding effect upon the various members of the crew merely because they are "seamen"? If a release is presumptively invalid because the seamen who execute them are "treated in the same manner as courts of equity are accustomed to treat young heirs dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees" then the contracts consisting of the shipping articles are likewise presumptively invalid for the same reason. The Congress, by enacting the statutes prescribing the form and substance of the required shipping articles and permitting the addition of any other conditions not contrary to law, has certainly indicated that it was of the view that seamen as a class are in all respects legally competent to fully understand and enter into *binding* contracts with their employers through the masters of the various vessels involved.

If seamen as a class are competent to fully understand and enter into a presumptively valid contract of employment they are certainly competent as a class to enter into a presumptively valid contract of release.

Title 28, U. S. Code § 1861 provides, in part, as follows:

> "*Any* citizen of the United States who has attained the age of 21 years and resides within the judicial dis-

trict, *is* competent to serve as a grand or petit juror *unless:* * * *

(2) He is *unable to read, write, speak and understand* the English language.

(3) He is *incapable,* by reason of *mental or physical infirmities* to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held." (Emphasis added.)

Section 198, California Code of Civil Procedure provides, in part, as follows:

"A person is competent to act as a juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

2. *In possession of his natural faculties and of ordinary intelligence and not decrepit;*

3. Possessed of sufficient knowledge of the English language." (Emphasis added.)

This Court will notice that neither the Congress of the United States, nor the legislature of the State of California were of the opinion that "as a matter of public policy", or for any other reason, seamen as a class are presumptively *non sui juris.* If such presumptive *non sui juris* status is so well recognized as to be a matter of common knowledge and therefore a subject of judicial notice without proof of the fact it would seem that the legislative bodies of the United States and of the State of California, should know about it and take notice of it by excepting all seamen from jury service. In fact the statutes of every State of the United States with reference to the qualifications of jurors could be quoted without finding in a single one of them any disqualification of seamen as a class.

Likewise there is nothing in the Constitution, the statutes enacted by the Congress, the constitutions of the various States or the statutes enacted by the legislative body of any State which gives the slightest indication that seamen as a class do not possess the qualification to hold *any* elective or appointive office which does not require special knowledge such a degree as a Doctor of Medicine or a degree as a Bachelor of Laws, etc. Jurors are required to read contracts, exhibits, and to be able to understand what negligence means upon being told that it is the doing of an act which an ordinarily prudent person would not do or the omission of an act which an ordinarily prudent person would do under the same or similar circumstances. They are required to have sufficient intelligence to understand the law applicable to a particular case upon hearing it read to them only once, when many lawyers are unable to understand it when they are given an opportunity to read it over and over again.

If a seaman happens to be called as a prospective juror in a United States District Court, and upon announcing the fact that his occupation is that of seaman, would any of the Judges of this Court, if sitting in a District Court, allow a challenge for cause upon the ground that there is a presumption raised by the rule announced by the United States Supreme Court that such seaman, merely because of his occupational status, is *non sui juris?* The mere statement of this question should be enough to illustrate the soundness of the contentions asserted by the petitioner in the instant case.

It is therefore respectfully contended that the "burden of proof" rule of the *Garrett* case is unqualifiedly and unquestionably unconstitutional.

Appellee was not required to argue the constitutionality of the *Garrett* case "burden of proof" rule in its brief be-

cause the appellant made no suggestion in his opening brief that the judicial power vested in the Supreme Court by the Constitution gave it the right to usurp the legislative power vested exclusively in the Congress by the same Constitution. Appellee was not attacking the judgment entered by the trial court and was entitled to assume that this Court would not, in its Opinion, introduce any controversial proposition of law, either substantive or procedural, or *sua sponte* premise a reversal in whole or in part upon any such court-erected premise.

The "court-made" burden of proof rule enunciated in the Garrett case is based upon a series of "court-made" presumptions. Reading the language of the Supreme Court literally it requires any person pleading a release executed by one whose occupational status was that of a seaman at the time of sustaining an injury to prove by affirmative evidence that the "seaman" executed the release with a *full* understanding of his *rights* and that *competent* medical and legal advice were and each thereof was available to the "seaman" at the very instant when he signed the release. Thus, in order to question the seaman as to *his* knowledge of his "rights", an *ex*-employer, is required, by this rule, to be a lawyer or at least know everything that a competent lawyer would know about the various matters underlying the bases of possible liability imposed by statute or the General Maritime Law upon the employer of a seaman; and the nature and limitations of defenses available to such employer. The *ex*-employer of such "seaman" pursuant to this "court-made" rule, would be required to prove by a preponderance of evidence that the "seaman" *fully* understood all of the ramifications of the Merchant Marine Act of 1920, Section 33, including *all* of the statutes of the United States modifying or extending that part of the Federal

Empoyers' Liability Act relating to personal injuries suffered by railroad employees (46 U.S.C. 688); and all of the bases of liability imposed upon the owner of a vessel for the benefit of a member of the crew thereof in the event such member of the crew suffered an injury in consequence of the unseaworthiness of the ship or a failure on the part of the owner thereof to supply and keep in order the proper appliances appurtenant to the ship; and that contributory negligence, in either event, is not a complete defense; and that assumption of risk is in neither event a defense at all; and that the "seaman" *fully* understood *all* of the elements of burden of proof, proximate cause, and measure of damages.[1] This places an intolerable, unreasonable and arbitrarily discriminatory burden upon the *ex*-employer of the "seaman". Inconceivable as it seems to be, the rule goes even further. It requires the employer to prove by a preponderance of evidence that the *nature* of the *legal* advice *available* to the seaman was of such caliber as to make it certain that the "seaman" at the *instant* he signed the release, had a *full* understanding of his legal rights and that the *nature* of the *medical* advice available to the "seaman" at the very instant he signed the release was such as to make it certain that he *fully* understood the nature and extent of his injuries. The ex-employer could not meet this part of the "rule" without showing that *at the time of signing* the release, the "seaman" had a competent lawyer and doctor at his side or at least available for telephone conferences. But this, astounding as it may appear, is not all! The "court-

1. This means that a corporate or individual ex-employer must violate the law which prohibits corporations from practicing law and which prohibits individuals from so doing unless duly licensed. Giving advice as to the law is "practicing law".

made" burden of proof rule also requires the ex-employer who has been stupid enough to make a settlement with a "seaman" in the first place, (and therefore should be tenderly treated, as a ward of the court) to prove by a preponderance of evidence to the satisfaction of a jury, that the *ex*-employer paid the "seaman" as a consideration for the execution of the release, a sum of money which the jury would consider to be an adequate (not merely reasonable) consideration therefor.

These "court-made" presumptions are in the general run of cases, for all *practical* purposes, incontrovertible. In the average case they erect an artificial and arbitrarily discriminatory barrier which deprives the ex-employer-defendant of a reasonable or fair opportunity to even *controvert* the presumptions.

This Court in the instant case, goes beyond the *Garrett* rule if that is possible. It says that the ex-employer cannot prevail as a matter of law, unless the seaman *admits* in his sworn testimony that a release is valid!

The "court-made" rule imposes the obligation upon the ex-employer to do more than merely controvert or evenly balance these artificial presumptions. In all litigation where the parties do not occupy a confidential relationship, the presumptions usually applicable are designated as *disputable* presumptions. In such cases the party against whom the disputable presumption is applied must offer evidence to controvert, not overcome, the presumption. If the disputable presumption is controverted by the adverse party the party upon whom the burden of proof is imposed must introduce other affirmative evidence, direct or indirect, sufficient to constitute a preponderance of evidence in favor of his contentions.

With reference to the presumptions introduced by the Supreme Court, the ex-employer must *affirmatively* prove the facts, contrary to the presumptions, by a preponderance of *direct* evidence.

Appellee respectfully submits that this "court-made" rule of "segregation" or "classification" is so arbitrarily discriminatory that it is incontrovertibly repugnant to the due process of law clause of the Fifth Amendment. It is also a violation of the constitutional right of every individual who happens to make his living as a seaman to enter into any contract which is not prohibited by or contrary to any public-policy statute enacted by the Congress or the legislative body of the particular state where the contract happens to be executed.

> "The rights of liberty, property, and the pursuit of happiness in which the individual is protected by the Constitution of the United States and of California apply as fully to his right to contract, untrammeled by unnecessary regulations, as they do to the freedom from arrest or restraint of person. * * * This liberty of contract, which includes contracts to work, contracts to employ, and liberty freely to make such contracts, means freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. But the power to restrict the right of private contract is strictly limited to police regulations in behalf of the public comfort, health, safety, morals, and welfare * * *. Nor does the legislature's power to impose reasonable regulations upon contracts subject to its jurisdiction include the right to impose such regulations as infringe upon the constitutional rights of the parties making the contracts." (11 Cal. Jur. 2d (Constitutional Law) § 198, pp. 601-602.)

Every ex-employer of a seaman is entitled to assume, if the seaman is *sui juris,* that such seaman has a constitu-

tional right to make a presumptively valid contract of release. If the ex-employer of a seaman is not entitled to rely upon that assumption then the constitutional right of the seamen in this respect will certainly be curtailed if ex-employers of seamen exercise ordinary common-sense under such circumstances. If the opinion of this Court is an enunciation of the actual rules of law applicable to compromises of *disputed* claims for damages asserted by "seamen" there will be an *abrupt* discontinuance of "settlements" if the ex-employers and their insurance underwriters use *ordinary common-sense,* and the courts will be flooded with *unnecesary* litigation. Is this what the Court intends to invite?

Ground Seven

An essential requisite of due process of law is that the Court which is to hear and determine a controversy *must be impartial.* Appellee disagrees and takes issue with the statement in the opinion that "no one disputes the premise that seamen are under the protection of the courts." *Every* litigant is entitled to the impartial disposition of litigated issues of fact and law. No litigant is entitled to the "protection of the courts" in the sense that any court may lawfully act in the conjunctive capacity of court and guardian. The courts have inadvertently created the basically fallacious fiction that seamen are "wards of the court" in cases where seamen were engaged in controversies with persons who *were* their employers at the time of the happening of accidents out of which subsequent claims for damages arose. The decisions use various phrases such as "wards of the admiralty" and "wards of the admiralty court", etc.

The Fifth Amendment, Constitution of the United States, provides that no person (and this includes a former em-

ployer of a seaman) shall be deprived of property without due process of law. If, in litigation between a seaman and a former employer, the court hearing and deciding any disputed questions of fact or law deems itself the *guardian* and the seaman its *ward,* the court could not be impartial. The temptation to favor the claims of the "ward" against those of a stranger and to give the ward the benefit of all doubts would effectively tend to deprive the stranger of a fair trial of issues of fact or law. For example, assume that John Doe is a duly appointed judge of the United States District Court. He is also, in his non-judicial capacity, the duly appointed guardian of Richard Roe, an "infant" of the age of twenty years and a seaman. There is no relationship of any kind between John Doe and Richard Roe excepting that of guardian and ward. If Richard Roe commenced an action for damages against a former employer under the Jones Act or the general maritime law is it not true that the guardian and ward relationship would preclude John Doe from hearing or adjudicating any issue of law or fact between the litigants? The only possible answer to this question is in the affirmative unless the employer knowingly waived the obvious disqualification. There is no compliance with the absolute right to due process of law unless the court hearing and deciding the issues of fact or *law* is *unqualifiedly* impartial. (*Inland Steel Co. v. Nat. Lab. Rel. Bd.,* 109 F. 2d 9; and *Nat. Lab. Rel. Bd. v. Ford Motor Co.,* 114 F. 2d 905; both Ninth Circuit decisions.) No group of human beings acting as a court can, with *certainty,* avoid being biased in favor of the contentions of one they regard as their ward. The testimony of the ward would naturally have more weight than that of a stranger and the ward's argument with reference to controversial questions of law would naturally be viewed as more sound than that of the

stranger. There should be an *abrupt and permanent destruction* of the *fiction* that seamen are *wards of the court.*

Therefore, *if* in the case at bar this Honorable Court has heard and decided the issues of law upon the premise that it was duty bound to protect the appellant as a guardian is bound to protect a ward, there has been a deprivation of the appellee-defendant's property right, consisting of the judgment, without due process of law.

Ground Eight

This Court has impliedly made objections, *nunc pro tunc,* as of March 8, 1954, and impliedly inserted these objections in the record on appeal; and predicated upon these *nunc pro tunc* objections, the Court has also *supplied* implied specifications of error setting out particularly the simulated "action of the Trial Court" in overruling the objections which were not made then but are inserted, *nunc pro tunc* at this time; and predicated upon all of the above fictitious foundation, this Court has reversed the judgment upon the following grounds:

1. The Trial Court erred in assuming that the evidence in the abortive trial was "live" for his consideration and that he was authorized to consider plaintiff-appellant's testimony, in the face of an objection made by the plaintiff-appellant in the trial court at the hearing of the motion for a summary judgment that the Trial Court had no such power. (Printed Opinion, top of page 4.) Appellant made no such objection in the Trial Court.

2. The Trial Court erred in rendering a summary judgment against a seaman (even though all of the evidence available to or within the cognizance of either of the parties up to the instant the motion for summary judgment was granted fails to show any genuine issue as to any material

fact relevant to the validity of a release or the ratification of a release) for the reason that if the motion were denied and a trial by jury were to take place the seaman may testify differently or correct the testimony given by him at the first trial, when questioned about it; there being, as a matter of law, no obligation upon a seaman to bring such matters to the attention of the Trial Court at any time during the hearing and consideration of a motion for a summary judgment. (Printed Opinion, pp. 6-7.)

The appellant made no objection *or suggestion* in the Trial Court which will support a ruling here that the trial court erred in failing to consider such *potential* issue of fact. (*Shafer v. Reo Motors, Inc.,* 205 Fed. 2d 685.)

3. The Trial Court erred in rendering a summary judgment against a seaman for the reason that the record on appeal does not indicate that the seaman ever *admitted* in his testimony that the release was valid. (Printed Opinion, p. 7.)

The appellant made no suggestion or statement in the Trial Court which will support this ruling; and it is respectfully contended that no precedent *can be found* or *cited* in support thereof. The surprising extent to which the Court has gone is illustrated by the following:

> "Neither the motion for a summary judgment, nor anything the court said, remotely indicated that the seaman ever *admitted* in his testimony that the release was valid." (Printed Opinion, p. 7.)

The attention of the Court is called to the following, taken from footnote 2, page 6, printed Opinion:

> "The Court: * * * I am taking the libelant's testimony at face value. I am taking his story as he told it, and as he told it I don't think he can avoid the release."

The Trial Court was speaking with particular reference to the *plaintiff's* testimony in the above quoted matter. It cannot be correctly stated that what the Trial Court said does not remotely indicate that the "seaman" ever *admitted* in his testimony that the release was valid. If it is true (and it cannot be presumed in the *absence of evidence to the contrary* that the trial judge, whose competency and integrity have been vouched for by a President of the United States and the Senate of the United States, was not giving an accurate resume of the plaintiff's testimony) that from the *plaintiff's* story, as *he* told it, the plaintiff cannot avoid the release, the remark of the Trial Court will certainly support an inference that the plaintiff's testimony showed, as a matter of law, that the only inference to be drawn therefrom was an *admission* that the release was valid.

With reference to the *motion* for a summary judgment, the Court overlooks the following, among the statement of reasons served and filed as a part of and in support of the motion:

> "* * * there is proof positive that Guerrero knew all of his rights set out in the paper (release) before he signed the release. * * * there can be no question but that the release is valid as a matter of law; that there is no question of fact to go to the jury; and that defendant, American-Hawaiian Steamship Company, a corporation, should have a summary judgment in its favor." (Tr. Rec. pp. 28-29.)

The plaintiff having failed to file a written or any statement in opposition to the defendant's statement of reasons in support of the motion, "such failure *shall* be deemed to constitute a *consent* * * * to the granting of said motion * * *." (Rules, United States District Court, Southern District California, Rule 3(d).) A *consent* to the granting of a

motion for a summary judgment certainly seems to *remotely* indicate that the "seaman" admitted that the release was valid. Why would he consent to the granting of the motion if the release was not valid?

The statement of the Court (Printed Opinion, p. 7.) that "there is no contention that appellant seaman admitted that the evidence established" "every essential to the validity of the release," is directly challenged by the appellee. That specific contention was asserted in the moving papers and in Point III of the "Brief for Appellee" it was contended that the appellant seaman had admitted that every essential to the validity of the release had been "proved" in the sense that by his silence, when denial was plainly called for, he authorized the Trial Court to assume that he admitted that there was no genuine issue of material fact relevant to the validity of the release.

4. The Court erred in that it "took the case to himself (*sic*) and found facts from evidence which had been presented in a former proceeding in a differently constituted Court." (Printed Opinion, bottom of page 8 and top of page 9.) Appellant made no objection in the Trial Court which will support this ruling.

5. The Trial Court erred in rendering a summary judgment for the reason that the moving papers in the summary proceedings show there were questions of fact at issue. (Printed Opinion, bottom of page 9.) Appellant made no objection or suggestion in the Trial Court or *here* which will support this ruling.

6. The summary judgment should be reversed because the record on appeal does not contain any transcript of the proceedings had before the jury was discharged. (P. 10, printed opinion.) This is attributable to the appellant; not to the appellee.

7. The Trial Court erred in that, contrary to the provisions of the Seventh Amendment, Constitution of the United States, it weighed conflicting evidence from which a jury could have rendered a verdict in favor of the plaintiff on the issues raised by the averments of the special defense to the effect that the plaintiff had excuted a valid and binding general release and the special defense premised upon the contention of the defendant that the plaintiff had ratified the release and decided, as a question of fact, that all of the testimony, and especially the testimony of the "seaman" constituted an admission of all of the elements necessary to the validity of the release, and said procedure was irregular and constituted clear error. (Printed Opinion, bottom of page 10.) The record on appeal does not support or justify this ruling.

8. The Trial Court erred in deciding, as a matter of law, that there was no genuine issue of material fact relevant to the contention of the appellee that the appellant had ratified the release by retaining the consideration received by him therefor and by not rescinding or offering to rescind said contract of release after he had available to him the professional advice of * * * David A. Fall. (Printed Opinion, page 11.)

None of these implied specifications of error is based upon any objection made in the trial court or asserted in the "Assignments of Errors" (Specifications of error) or the "Outline of Argument" (summary) preceding the argument which commences on page 8 of the opening "Brief for Appellee."

In the appellant's "Statement of the Case" he sets forth assertions as to alleged fact (p. 3, l. 16 to p. 4, l. 11.) but *he refers to no part of the record on appeal to substantiate these assertions.* Therefore, appellee believed that this

Court would ignore them in accordance with established precedent. In the remaining portion of the "Statement of the Case" he fails to contend that *there was a genuine issue of material fact* as to *any* matter which might affect the validity of the release or the ultimate decision with reference to the defense of ratification.

This Court must have had a very difficult task in preparing a written Opinion reversing the judgment in the absence of an opportunity to examine the evidence, oral and documentary, which was the basis of the ruling of the Trial Court *"that there is no genuine issue as to any material fact set forth hereinabove in these Findings of Fact."* (Tr. Rec. p. 52, ll. 8-9.) This ruling is exactly the same as though each "finding" from and including I to and including XIV were preceded by the following language: "There is no genuine issue as to any of the following material facts:" Appellee cannot understand how *this* Court can reverse the judgment upon the ground that the Trial Court committed error in so deciding, as a matter of law, when *this* Court cannot have the *slightest* actual knowledge from reading the "Transcript of Record" filed May 21, 1954, whether the evidence, oral and documentary, submitted to the Trial Court for its inspection and consideration does or does not support the action of Judge Westover.

Did the Court supply the additional specifications of error because of the premise which it assumed at the outset that "seamen are under the protection of the courts" to a preferential extent not accorded to other litigants?

In this respect the Court has also *amended* the opening brief of the appellant by its *sua sponte* action in raising points which were *not* raised in the opening brief or even preserved for review by any pertinent objection in the trial court proceedings. The appellant, in the trial court, did

not object to the *use* of the "transcript of the evidence" by the trial court for the purpose of determining, as a matter of law, whether there was a genuine issue of material fact relevant to the validity of the release. Appellant did *not* challenge the *power* of the trial court to *use and consider said "Transcript of the evidence" or the exhibits* which had been introduced and were part of the files and records of the case. Appellant's objection was directed to *an entirely different point.* It related *exclusively* to a mere *contention* that the testimony introduced at the time of the trial; and the exhibits on file and the "transcript of the evidence" contained *conflicting* evidence or that reasonable men might draw different inferences therefrom and that *therefore* there were substantial issues of material fact relevant to the validity of the release. Appellant did *not,* however, refer the trial Judge to *any* direct or indirect evidence (testimony of witnesses, documents marked as Exhibits or inferences which *could* be based thereon) which would indicate the existence of a genuine issue of material fact.

This Court cannot, without repudiating or ignoring its own rules, the Rules of Civil Procedure applicable to appeals, and the doctrine of *stare decisis* consider or decide whether genuine issues of material fact are shown in the evidence which both parties *conceded,* by not contending otherwise when ample opportunity was afforded to do so, was the only evidence which either of the parties knew anything about up to the time of the actual hearing of the motion for a summary judgment *without examining the same evidence* which was used and considered by the trial court. It isn't in the record on appeal. It was not the duty of the appellee to cause it to be brought up as a part of the record on appeal unless this Court is of the view that an arbitrarily discriminatory exception to the provisions of

Rule 75, Rules of Civil Procedure, which places the burden in that respect upon *every* appellant, is required in *every* case where the appellant happens to be a seaman; and that in such cases if the appellant does not furnish the appellate court with a complete record of what took place in the trial court it is the duty of the appellee to do so. Any such exception would be a clear violation of the due process of law clause of the Fifth Amendment.

This Court has overlooked the cardinal rule that it is an *appellate* Court and that its functions are *confined* to considering errors of law *committed* by the trial court and affirmatively appearing on the face of the record on appeal. Error is never *presumed.* All intendments, in the absence of an affirmative showing to the contrary, are in favor of the due and regular performance of the judicial acts of a trial court. In the matter quoted by the Court in footnote 2, there is *absolutely nothing* which supports the statement that the appellant ~~*denied* that~~ CONTENDED the trial court had no power and was not authorized *to use and consider* the matters and things which the trial court *did* consider in ruling on the motion.

This Court has also denied the appellee any opportunity whatever to be heard with respect to these alleged prejudicial errors which were impliedly asserted by this Court in the appellant's opening brief, as a part of the specifications of error. Is this fair?

Ground Nine

The appellee in its brief raised the following substantial questions of law:

> 1. "The fact that a formal issue as to the validity of the release was raised by operation of law did not entitle the appellant, *ipso facto,* to a trial by jury with reference to that proposition."

2. "Appellant's contention that Section 55 of Title 45, U. S. Code, is applicable to a release and settlement is invalid."

3. "The appellant has failed to comply with the rules of the United States District Court, Southern District of California."

4. "The appellant ratified the contract of release by retaining the consideration and failing to return or offer to return any part or portion of the consideration."

Appellee believes that this may be a very important issue of law in this case because of the fact that the Court has stated as follows:

> "But the moving papers in the summary proceedings show there were questions of fact at issue." (Printed Opinion, bottom of page 9.)

In the "Brief for Appellant" he makes a very strenuous argument addressed to the proposition that the allegations of the complaint were denied by the answer and that therefore, *ipso facto,* the "moving papers" showed that there were genuine issues of material fact which entitled the appellant to a jury trial. (Brief for Appellant, pp. 14A-18; p. 19.) It seems to appellee that this Court has embraced this novel theory; but it has no merit as the Court will see upon a reading of its own decision in the case of *Koepke v. Fontecchio,* 177 F.2d 125, 127.

If the Court, in making the statement referred to hereinabove, was confining itself literally to the "moving papers" then it had reference to the notice of motion and motion for a summary judgment, the memorandum of points and authorities in support thereof, and the proposed findings of fact, proposed conclusions of law and proposed summary judgment.

It is respectfully contended that an analysis of the "moving papers" will demonstrate that the Court is in error when it says *in effect* that the "moving papers" in the summary proceeding show there were genuine issues of *material* fact at issue, *relevant* to the validity of the release or the subject of ratification.

Because of the ambiguity and uncertainty resulting from the use of opaque language by the Court, without even a reference to the pages and lines of the "Transcript of Record" which might give a clue to the issues the Court had in mind, it is necessary to take pages to demonstrate by a process of elimination that the Court is in error. In the event this petition for a rehearing is denied, the appellee respectfully requests that the opinion be amended at the end of this statement with a reference to the pages and lines of the Transcript of Record which are believed by the Court to support this statement so that the time of the Supreme Court of the United States will not be unnecessarily consumed in following the appellee through a detailed process of elimination.

Appellee assumes that what the Court had in mind is the fact that the moving papers show on their face that there were disputed questions of fact and differences in opinion as to the amount of a settlement sum exhibited in the recitals of the negotiations leading up to the execution of the release. But the Court has failed to take cognizance of the proposition that: 1. The dispute between Guerrero and Holbrook with reference to the *identity* of the person who *wrote* the figures and items on the memorandum, (Tr. Rec. p. 27, l. 7 to p. 28, l. 22) did not raise any genuine issue of *material* fact relevant to the validity of the release or the subject of ratification. Let us assume that a jury had made express findings in the exact language of the find-

ings of fact signed by the Trial Judge. Let us also assume that a jury also made a specific finding that all of the items and figures were placed on the memorandum by Gus Oldenburg and that Holbrook had nothing whatever to do with writing anything thereon. Would such finding, in the face of the other express findings, support a verdict in favor of the plaintiff upon the ground that the *identity* of the person who wrote the items and figures on the memorandum, admittedly in the possession of the appellant for quite some time and obviously read and considered by him, had the slightest materiality or relevancy in determining the extent of the actual knowledge of the appellant in respect to the *contents* of the memorandum? The memorandum was relevant and material to one point only: was there any genuine issue of material fact relevant to the understanding of the appellant with reference to the extent of his "rights" in so far as the memorandum placed the elements thereof within the visual and perceptive powers of the appellant. The "dispute" between appellant and Holbrook was, as a matter of law, collateral, irrelevant and immaterial.

The fact that appellant telephoned to the San Francisco office of appellee and "expressed a *lack of confidence* in his attorney and informed the witness Slevin that he, Guerrero, *was consulting his own doctor*" (Tr. Rec. p. 28, ll. 23-26) would not support a finding that said attorney, whoever he was, was not competent or honest, or that competent legal advice was not *available* to appellant at the time he signed the release. The Court will take judicial notice, from its own roll of attorneys who were licensed to practice in the United States District Court, Southern District of California, that there were attorneys, counselors and *proctors in admiralty* in Los Angeles, Wilmington, San Pedro and Long Beach, California, from any one of whom appellant

could have procured any legal advice he might have needed. The fact that appellant *was* at the time of the telephone conversation, which was before the release was executed, *consulting his own doctor,* would not support a finding that competent medical advice was not available to him at the time he signed the release.

The fact that there was a disagreement between appellant and appellee with respect to the total amount which the appellant *asked* as a consideration for the execution of a release, either at the start of the negotiations which were *instituted* by the *appellant*—not the appellee—or during the course of the negotiations and the amount which the appellee was willing to pay would not support a finding that the appellee *executed* the release as a result of fraud or misrepresentation or mutual mistake of fact or as a result of deception or coercion or without a full understanding of his "rights". In every case involving a compromise of a disputed claim, in the negotiations leading to the ultimate meeting of the minds of persons *sui juris* as to the amount which one will accept and the other will pay as consideration for the execution of a release, there is at the start a "puffing" of the claim by the one asserting it and a "deflation" of the claim by the one contesting it. If this sort of difference is a genuine issue of material fact which would support a verdict that a release is void or even voidable, no trial court could in any case involving a defense premised upon a release grant a motion for a non-suit, summary judgment, directed verdict or judgment *non obstante veredicto.* In this respect, the appellant makes the fallacious contention that the mere fact that the jury in attendance at the mistrial disagreed demonstrates, *ipso facto,* that there were genuine issues of material fact relevant to the validity of the release. If that were so, no trial court could ever grant a motion

for a directed verdict or judgment *non obstante veredicto* after a jury had actually rendered a verdict. The contention of appellant, in this respect, is unadulterated sophistry.

If appellee has not yet ferreted out the matters which the Court had in mind in stating that the moving papers in the summary proceedings show there were questions of fact at issue, the only other matter or thing to which the Court could have been referring is the argument in the opening "Brief for Appellant" which points out that all of the material averments of the complaint were denied and that therefore the appellant, without further ado, was entitled as a matter of right to have the case tried by a jury. Appellee cited a decision of this Court to the contrary in its brief. The Court says nothing about that decision in the Opinion and in all probability overlooked it if it has embraced the theory of appellant with reference to the issues raised by the averments of the *complaint* which are denied in the answer. Not being a mind reader, appellee's counsel has been compelled to do the best he could by the process of elimination to discover what the Court was referring to. If the truth has not been discovered, will the Court please put the matter in plain words so that the trial court and appellee will know what the Court intended to refer to?

Appellee's contention that "the appellant has failed to comply with the Rules of the United States District Court, Southern District of California" has not been disposed of by any decision one way or the other on this point. It is clear from the Brief for Appellee, pages 22-27, that appellee raised the direct contentions that the appellant by his failure to serve and file any statement of reasons in opposition to those set forth in the appellee's Memorandum of Points and Authorities consented to the granting of the motion, and by his failure to serve and file a statement of genuine

issues, setting forth all material facts as to which it was contended there existed a genuine issue necessary to be litigated, the appellant, in effect, admitted the fact that there were no genuine issues of material fact with reference to the seventeen items printed on pages 23-26 of the Brief for Appellee.

This Court has not decided one way or the other whether the local rule is or is not valid or what the effect of a failure to comply therewith may be on a motion for a summary judgment. The Court's dissertation with respect to the fact that the rule does not *require* the Trial Court to assume that there is no genuine issue of material fact is beside the point. The record on appeal does not *affirmatively* show that the Trial Judge did *not* so assume.

The "Reporter's Transcript of Proceedings" which took place on March 8, 1954, shows no contention of any kind by plaintiff's attorney of the existence of any *evidence* (oral or documentary), competent, material, relevant or otherwise, upon which he claimed that any jury *could* make an express or implied finding that the plaintiff did not on the 26th day of August, 1949, duly make and execute a general release. Plaintiff's attorney did not call to the attention of the trial court any evidence (oral or documentary), which he claimed would support express or implied findings of a jury as follows: that the *execution* of the release was induced by any fraudulent representation made to the plaintiff; or that the plaintiff was fraudulently induced to believe that the money was not being paid to him as a release of any possible claim for damages he might have pursuant to the Jones Act; or that he was fraudulently induced to believe that he was merely signing a receipt or a release with referenec to possible claims which were entirely extraneous to any claim for damages proximately resulting from

bodily injury; or that the plaintiff was fraudulently induced to believe that his bodily injuries were ~~more~~ LESS serious than he believed them to be; or that there was any threat by the defendant to the effect that if the plaintiff did not execute a full and complete release the defendant would refuse to pay him the sum arising from contractual obligations and to which he was then entitled as a matter of right; or that unless he signed a general release the defendant would refuse to pay him the sum of $12.00 which he then had coming to him as maintenance; or that the release was not freely executed; or that the release was not executed by plaintiff with a full understanding of all of his rights; or that the nature of the medical or legal advice *available* to plaintiff at the time he signed the release was not reasonably adequate to aid him in his own understanding of his rights; or that the net sum of $1034.54 was so inadequate as to justify the inference that the plaintiff did not have a full understanding of his rights.

The fact that the allegations in the special defense of the defendant deemed denied by law and thus raised *formal* issues is not to be considered as raising genuine issues of material fact within the meaning of that language as it appears in Rule 56, F.R.C.P. "The court always looks beyond the pleadings and determines whether there is a genuine issue of material fact to be tried." (*Griffith v. Wm. Penn Broadcasting Co.,* 4 F.R.D. 475, 477. Cf. *Koepke v. Fontecchio* (9th Cir.) 177 F. 2d 125, 127.)

In *Griffith v. Wm. Penn Broadcasting Co.,* cited by this court in its opinion there is a pertinent and correct statement of the rule: "If the parties are unable to establish the existence of substantial competent evidence to support the allegations or denials thereby indicating a genuine issue of fact, the court may summarily determine the litigation on

the law. *Whitaker v. Coleman,* 5 Cir., 115 F.2d 205. But the presence of a real and material issue of fact precludes further consideration of the matter under this rule." (4 F.R.D. 475, 477.)

During the oral proceedings of March 8, 1954, appellant's attorney stated his personal conclusions, as follows:

1. The court is not entitled to decide from all of the facts presented to the jury that the release is valid and good. *That is a question of fact for the jury.*

2. In response to the statement by the trial court: "I have considered his testimony. I have taken his word for it. I am not deciding this upon the testimony of the respondent. I am deciding it upon the testimony of the libelant himself" appellant's attorney made the following statement: "You are going into a question of fact which is a fact that the jury must determine. This court does not have the power to determine a question of fact."

3. In response to the statement by the court: "*If* I were *resolving* the facts, if I were to disbelieve the libelant's testimony, then I would send it back to the jury. But I am taking the libelant's testimony at face value. I am taking *his* story as *he* told it, and *as he told it, I don't think he can avoid the release",* appellant's attorney made the following statement: "This court can't determine that. That is a question of fact for the jury." (Reporter's Transcript of Proceedings, March 8, 1954, p. 8, l. 9 to p. 10, l. 10.)

In this colloquy, appellant's attorney did not mention any evidence to which the court had referred or *any* evidence, oral or documentary, which the appellant could or would introduce, upon a trial before a jury in the event he had the opportunity to do so, which would present any genuine issue of material fact relating to any recognized basis upon which a jury *could* determine that the release was *void* or even merely voidable.

The mere fact that appellant's attorney expressed his contention that the validity of the release was a question of fact for the jury does not amount to an affirmative showing that the trial court was not fully justified in determining, as a matter of law, that there were no genuine issues of material fact pursuant to which a jury might lawfully find that the release was void or voidable.

Appellant's attorney did not assert a contention to the effect that a jury would be lawfully entitled to find, upon the basis of any competent evidence already adduced or which could thereafter have been adduced at a trial, that the release was void *ab initio*.

The clear distinction between a release or any other contract which is void *ab initio* and one which is merely *voidable* is apparently not recognized by appellant's attorney. The distinction was inadvertently overlooked by this Court. With specific reference to the release involved in the instant case, if by reason of a fraudulent misrepresentation or concealment of the contents of the written release pursuant to which a claim for damages under the Jones Act was specifically released, the appellant had been fraudulently led to believe that the entire consideration, whatever it was, was being paid to him on account of claims entirely extraneous to any claim for damages by reason of bodily injuries, then and only then would he be entitled to contend that the release, insofar as its literal terms wiped out a claim under the Jones Act, was void *ab initio;* and he would not, if he could convince a jury that his version was correct, be required to restore or offer to restore the consideration or any part thereof as a condition precedent to filing or maintaining an action for damages premised upon the Jones Act. However, in such case, the rule of law actually applicable would not permit any court to authorize a jury to make a finding that

the release was not void *ab initio,* and was only voidable, and thereupon render a verdict in any particular sum for damages and merely deduct therefrom the amount of the consideration which had been paid therefor. Under such circumstances, if the jury found that the release was not void *ab initio* but was merely voidable, the general verdict of the jury would have to be in favor of the defendant; unless the appellee had refused to agree to a rescission upon an offer of the appellant to do so and the jury determined that the appellant was entitled to prevail on the question of rescission. If a jury found that appellant was entitled to prevail on an issue of rescission *then,* and only then, could it render a general verdict for appellant and give credit for the amount already paid.

There is no room for controversy with reference to this principle of law. No adult person who was *sui juris* at the time of executing a *voidable* release is entitled to have any jury consider his claim for damages or to render a verdict in his favor unless he restores or offers to restore the consideration which was paid to him. He cannot blow hot and cold. He cannot claim that a release was the result of a mutual mistake of fact, for example, thereby contending that neither of the parties to the release intended to make the contract which they did make and at the same time keep the money which was paid to him by one of the parties as the sole proximate result of such mutual mistake of fact. The thoroughly established rules of restitution inhibit any such inequitable proposition.

This Court has reversed the summary judgment. In doing so it inadvertently committed the grievous error of assuming that there was a genuine issue of material fact with reference to a claim asserted by the appellant and denied by the appellee that the release was void *ab initio.*

Ground Ten

On page 28 of the "BRIEF FOR APPELLEE" appellee directly raised the following contention: "THE APPELLANT *RATIFIED* THE CONTRACT OF RELEASE BY RETAINING THE CONSIDERATION AND FAILING TO RETURN OR OFFER TO RETURN ANY PART OR PORTION OF THE CONSIDERATION." Appellee also contended, on page 30 of the "BRIEF FOR APPELLEE" as follows: "Under the foregoing circumstances it is clear that *the appellant elected to stand upon the contract. He cannot stand upon it and repudiate it at the same time.*"

Appellee cited and quoted from a "JONES ACT" case in which a longshoreman, held by the United States Court of Appeals to be a *"seaman"* within the meaning of that word as it appears in the "Jones Act", had executed a release which, literally construed, covered the claim for damages asserted in Court by said "seaman". The Court of Appeals *held* that the *only* reason the doctrine of ratification was not applicable to his conduct was that he claimed and proved to the satisfaction of the trier of fact that "there was a *fraud* in *creating* the *written* memorial of (a contract to settle a claim for lost wages *only,* for the sum of $300.00) in inducing him to *execute a paper whose contents were misrepresented to him.*" The United States Court of Appeals said:

> "He can annul this paper for *that* reason without abandoning the *real* contract, and without returning the $300 *if* it was really paid to him *to settle his lost time* as he says, and *not* for his signature to the paper, or *for a general settlement. This* was a question of fact." (Emphasis added.)
>
> *Panama Agencies Co. v. Franco,* 111 F.2d 263, 266.

This Court disposes of the foregoing contentions of appellee by an inadvertent usurpation of the legislative powers

of the Congress or of the legislature of the state of California (the State in which the contract of release was executed); whichever of these two legislative bodies is vested with power to enact a statute restricting the defenses available to an ex-employer of a "seaman" in an action for damages against the ex-employer by reason of bodily injuries. The opinion of this Court is in clear and direct conflict with that of the United States Court of Appeals, in *Panama Agencies Co. v. Franco, supra,* even though this Court has apparently chosen to say nothing about it *in the opinion* in the instant case. It is also in clear and direct conflict with the decision of the United States Supreme Court in *Callen v. Pennsylvania R. Co.,* 332 U.S. 625, 92 L.ed. 242 which holds that in *all* actions for damages predicated upon the Federal Employers' Liability Act (said F.E.L.A. being a part of the Jones Act by reference thereto) the doctrine of ratification *is* applicable.

No court is vested with power to create public policy. This Court has no such power. Its power is strictly statutory and is confined, in the instant case, exclusively to the exercise of *appellate* jurisdiction for the sole purpose of correcting errors of law which are shown *affirmatively* on the face of the *actual* record on appeal to have been committed by the trial court.

The creation of an arbitrarily discriminatory exception to any established substantive or procedural rule of law is in excess of the statutory judicial power vested in this Court by the Congress pursuant to its *exclusive* constitutional power to do so; and it is also in clear contravention of the due process of law clause, Fifth Amendment.

This Court summarily disposes of the contentions of appellee based upon the established principles of ratification by the statement, as follows: "The doctrine is good as to

certain *commercial* transactions, but has no application to the instant case." (Emphasis added.) The Court cites two cases in support of this novel and fundamentally unsound declaration.

In *Garrett v. Moore-McCormack Co., Inc.,* 1942, 317 U.S. 239, there is nothing said about whether the doctrine of ratification of a *voidable* release is or is not applicable to a man who makes his living as a seaman.

> "For a prior decision to control a subsequent case, the first requirement is of course that the prior decision be in point, that is, that it shall have been decided on substantially the same facts, and that *the issues presented* by the *later* case shall have been *raised, considered* and *determined* in the former one.
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> * * *
>
> "It is a fundamental qualification of the doctrine of stare decisis that the authority of a decision is limited to the points therein actually involved and actually decided. Thus, such authority does not extend to what may be said in the opinion aside from or in addition to the decided points. Neither does it extend to any legal proposition which on the facts of the case *might* have been but *was not raised or decided.* And an opinion that does not consider questions pertinent to the instant case cannot be relied on as a precedent, though the questions may be said to 'lurk' in the court's decision." (Emphasis added.) (13 Cal. Jur. 2d 660-663.)

Please also see:

Pacific S.S. Co. v. Peterson, 278 U.S. 130, 136; 72 L.ed. 220, 223.

> "In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this court has never felt constrained to follow precedent. In constitutional questions, where correc-

> tion depends upon amendment and not upon legislative action this court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is *particularly* true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the constitution to extract the principle itself. Here we are applying, contrary to the recent decision in Grovey v. Townsend, the well established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote. *Grovey v. Townsend* is overruled." (Emphasis added.)
>
> *Smith v. Allwright,* 321 U.S. 649, 665-666; 88 L.Ed. 987, 998.

This Court does not point out in any clear language why it is of the opinion that the United States Supreme Court *decided* in the *Garrett* case that the doctrine of ratification is in no case applicable to a person whose occupational status is that of "seaman". Sometimes, thoughts are concealed rather than revealed by the language used. Appellee is entitled to assume and contend and does assume and contend that what this Court has obscured with the vagueness of its language and has not put in direct and concise language is this: the *Garrett* decision is *stare decisis* upon the proposition that *every* seaman is *presumptively non sui juris* at the time he *executed* a release of a claim for damages arising from a claimed maritime tort and has remained in a *presumptively non sui juris status* from the time he "executed" a release up to and including the time when the ex-employer is able to prove by a preponderance of evidence that he was not in a *non sui juris* status at or during any of the intervening time; and that therefore the

release in the case at bar was and is *presumptively void* and the appellant because of his presumptively *non sui juris* status was under a recognized disability similar to that of an incompetent person and for *that* reason excused from the ordinary obligation imposed upon persons *sui juris* to elect whether to rescind a voidable contract of release or ratify and confirm it.

In any event this Court has by clear implication enunciated that such is the rule governing the decision of the Court on the ratification issue in the case at bar. Appellee directly and vigorously asserts that the introduction of such an exception to the general principles of ratification is condemned by common sense, the ordinary traditions and ideals of fairness; and is in contravention of the due process of law clause of the Fifth Amendment. It is a clear and arbitrary discrimination in favor of the appellant and against the appellee, without the slightest evidence in the record on appeal to support it.

Pursuant to the "equal protection of the laws" clause of the Fourteenth Amendment (not in *all* cases binding on the federal courts) no state legislature would be permitted to create any such arbitrarily discriminatory exception to the general rules of ratification. The United States Supreme Court would unhesitatingly strike it down. All seamen are born of women like the rest of us. They all go to the same type of schools and learn to read and write. The mere label of "seamen" does not make an ordinarily intelligent man a dunce, a nit-wit, or *ipso facto* and automatically a credulous individual apt to be imposed upon by artful and designing persons; and all ex-employers of "seamen" are not *ipso facto* artful and designing persons. The relationship between a ship-operator and a seaman when the seaman is actually a member of the crew of a vessel operated by his

employer is *not* a *confidential or fiduciary relation.* It does not come within any of the definitions of a confidential or fiduciary relationship. (Please see: Words & Phrases, Annotated.) It is, in any event, a legal certainty that *after* the employer-employee relationship has ceased to exist they deal with each other with reference to the execution of contracts upon the same bases as they deal with other persons who stand in the relation of "legal-stranger" to them.

No one would resent the implications of the *non sui juris* fiction more than the seamen themselves. Is it this Court's considered opinion that all of the cargo and passenger-carrying vessels of the United States Merchant Marine are manned by persons so utterly lacking in perspicacity or inherent intelligence that they would not, as a class or category, be competent to sit as jurors in the trial of action for damages for personal injuries; or that they do not have normal powers of perception which would enable them to read and understand the plain and unambiguous language of a simple release? If so, how do they understand their "rights" and duties as provided for in the "not too simple" language of "Shipping Articles", which an act of the Congress *requires* them to execute? *All* men aboard a vessel and aiding in her navigation are seamen within the meaning of that word as it is used in the Jones Act. Are the masters, mates and licensed engine room personnel all included in the rules introduced by the United States Supreme Court in the *Garrett* case and by this Court in the instant case? If not, where is the line of segregation, *inter sese,* drawn?

CONCLUSION

It is respectfully contended that the various federal courts which have created or accepted the "premise" that "modern-day" seamen are entitled to "the protection of the

courts" have done so inadvertently. *Perhaps* the various courts and judges did this because they were concentrating their attention exclusively upon the over-powering rays of a fallacious "spotlight" which drilled into the ordinarily impartial judicial minds the false premise that all seamen are presumptively *non sui juris.*

If this is so, then the courts have been victims of self-hypnosis and have mesmerized themselves to the extent that they have, in effect, eradicated and discarded all of the thoroughly established substantive and adjective law, under the common-law and equity jurisprudence, relevant to a defense premised upon the admitted execution of a release by *any* adult person in the *full* possession of *normal faculties of perception.*

The Congress, by statute enacted many years ago, provided that "each justice or judge of the United States shall take the following oath or affirmation before performing duties of his office: I, ..., do solemnly swear (or affirm) that I will administer justice *without respect to persons,* and do *equal* right to the poor and to the rich, and that I will faithfully and *impartially* discharge and perform *all* the duties incumbent upon me as ..... according to the best of my abilities and understanding, *agreeably* to the *Constitution* and *laws of the United States.* So help me God." (In the present form: Tit. 28, U.S. Code, § 453.) (Emphasis added.)

The Constitution provides:

> "*All* legislative Powers herein granted *shall* be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. (Article 1, Section 1. Emphasis added.)
>
> * * *
>
> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts

and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

"To borrow Money on the credit of the United States;

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

"To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

"To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

"To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

"To establish Post Offices and post Roads;

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

"To constitute Tribunals inferior to the supreme Court;

"To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

"To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

"To provide and maintain a Navy;

"To make Rules for the Government and Regulations of the land and naval Forces;

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as

may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Section 8, Article 1.)

* * *

"The powers *not delegated to the United States by the Constitution, nor prohibited by it to the States,* are reserved to the States respectively, or to the people." (Amendment X; emphasis added.)

Article III, Sections 1 and 2, of the Constitution provides as follows:

"Section 1. The *judicial* Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

"Section 2. The *judicial* Power shall extend to all Cases, in Law and Equity, arising under this Constitu-

tion, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In *all* the *other* Cases before mentioned, the supreme Court shall have *appellate* Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (Emphasis added.)

The fact that the *judicial* power of the United States Supreme Court vested in the Supreme Court extends "to all Cases of admiralty and maritime Jurisdiction" does not authorize that Court to add to, subtract from, modify or extend the substantive or adjective "admiralty and maritime Jurisdiction" *as it existed at the time of the ratification of the Constitution.* These subjects are within the *exclusive* legislative power of the Congress, pursuant to *its* right "To make *all* Laws which shall be *necessary and proper* for *carrying into Execution* the foregoing Powers, and all *other* Powers vested by this Constitution in the Government of the United States, or in *any* Department or Officer thereof." (Last sentence, Article 1, Section 8, Constitution of the United States; emphasis added.)

In the case of *Garrett v. Moore-McCormack,* 317 U.S. 239, 87 L.ed. 239, the Supreme Court not only referred to the decision written by Justice Story sitting on Circuit in 1823, in the case of *Harden v. Gordon,* 2 Mason 541, Federal Case No. 6047, 11 Federal cases 480, but quoted therefrom. (This Honorable Court has also cited the same case at the bottom of the first paragraph on page 11, printed Opinion.)

The strange thing about the whole business is that the Supreme Court did not quote from or refer to the part of Justice Story's Opinion which was specifically applicable to the subject of burden of proof in cases involving releases signed by a seaman. The part of the Opinion quoted by the Supreme Court had reference to matter which had been inserted, *in handwriting,* in a printed form of a contract of employment, which most of the witnesses contended was not on the document at the time it was signed by the seamen.

In a subsequent part of the same Opinion, when Justice Story got down to brass tacks on the subject of releases, this is what the Court said:

> "In every view, which the court has been able to take of the point now under consideration, the respondents have failed to establish, that they were not originally liable for the charges of sickness claimed by the libellant. But it is insisted, in the last place, that the claim, whatever might have been its original validity, has been completely adjusted and settled by the parties. And a receipt, given by the libellant, is relied upon as satisfactory proof of the fact. In respect to instruments of this nature, however general and comprehensive their terms may be, there is no pretence to say, that they have a binding *and conclusive* effect. The most, that can be attributed to them, is, that *they afford prima facie evidence of all, that they purport to declare,* and *that they are to stand, until overthrown by counter proof from the other party.* They do not arrogate the

high prerogatives, which the common law has attributed to releases under seal; and even these may be *set aside in equity,* when *surprise, fraud, mistake,* or *undue influence have intervened to the material injury of the party.* It need hardly be said, that *courts of admiralty* in the administration of their duties, *seek to follow the general principles of justice, rather than technical rules, and consequently avail themselves more of doctrines founded in* general *equity,* than in the inflexible strictness of the common law. They have not the rashness to impute blame to the latter, for they are not insensible of its excellence. But they understand, that the common law does not affect to apply remedies to all cases of injustice; and leaves to other courts the full right to pursue a more enlarged equity, whenever their constitution enables them to favour and support it. When a receipt is given in full of all demands, it is not to be taken in the admiralty as *conclusive.* It is *open to explanation,* and upon *satisfactory* evidence may be restrained in its operation. *But the natural presumption is in its favour,* and *that* presumption will *prevail, until it is displaced by direct proof or strong circumstances. Indeed* in cases of doubtful or conflicting claims, where a compromise takes place, and receipts are given, as final discharges between the parties, upon deliberate consideration and in good faith, *there is the greatest reason to uphold these instruments, for they tend to general repose and security.* But when there has been no such compromise; when there has been an entire mistake of right, or an unobserved comprehensiveness in the language, reaching beyond the matters under settlement, there would be gross injustice in refusing the injured party an equitable relief. These observations apply to general receipts. But when, as in the present case, the receipt is merely annexed to the foot of an account, and admits the payment of the balance only, it is to be viewed merely as a stated account, and confined in its opera-

tion to the items, which are specified. It cannot by any ingenuity be made to reach other claims which it neither recognises nor repudiates. Now a stated account is liable to be impeached; and in a fit case the party is admitted to surcharge and falsify it. If errors and mistakes are apparent on the face of it, or the party comes with a strong case, recenti facto, courts dealing in equities are in the constant habit of affording relief. And, what presses with more force on the present occasion, there are situations of peculiar influence and confidence between the parties, in which the opening of settled accounts is very reluctantly refused, and very easily permitted. But it is not necessary to examine this matter very minutely, because, in the case before the court, there is no settlement of any claim, except that of wages and an inconsiderable item for medicines. The other items are not even mentioned in the account; and it is signed with an express exception of errors. It therefore concludes nothing, and is now open to correction as to the item of medicines, for which, upon the principles already stated, the libellant is not liable. As a receipt, or as a stated account, it presents no bar whatsoever to the controverted claims; and if a final settlement of these claims is to be established upon evidence aliunde, that evidence has not as yet been produced. On the other hand, such a settlement is utterly denied by the oath of the libellant, and that oath is supported by the exception of errors on the settled account. This point of defence may then be dismissed without farther comment, as sustained neither de facto, nor de jure."

Harden v. Gordon et al., 11 Fed. Cas. 480, 487-488.

(Emphasis added.)

The federal courts, from the United States Supreme Court down to the United States District Court, could not have modified or extended the common-law rights or

remedies available to railway employees. It required an act of the Congress to do this. The United States Supreme Court decided that the Congress was vested with legislative power to do this *solely* because of its *exclusive* right "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *". All that the federal courts have is "*judicial* Power". They possess *no legislative power* whatever. Creating, modifying, extending or repealing *any* law, substantive or adjective, applicable to the *exercise* of "judicial Powers" vested in the federal courts by the Constitution, is the exclusive function of the Congress.

Whether or not the Congress would have any legislative power to enact a statute controlling the right of two or more persons to execute a contract depends entirely upon the subject matter of the contract. If the subject matter does not involve any matter which is subject to regulation or control by the Congress in the exercise of the powers specifically vested in it by the Constitution, then exclusive legislative powers with respect thereto are reserved to the States, or to the people. Therefore the question of burden of proof to show the validity or invalidity of a release executed by a person whose occupational status is that of "seaman" is a matter which is subject to exclusive control of the state where the contract was executed.

The *judicial* power of the United States Supreme Court extends "to all Cases of admiralty and maritime Jurisdiction" *but* the Constitution also plainly provides that with respect thereto "the *supreme* Court shall have *appellate* jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make." (Article III, second paragraph of Section 2, Constitution of the United States; emphasis added.)

Expressio unius est exclusio alterius.

Therefore, the United States Supreme Court has never been vested with lawful power to *create* any substantive law or any exception thereto with respect to the subject-matter of releases executed by seamen or any other person. Neither has *this* Court. The Congress has authoritatively legislated with respect to the alteration and modification of the general maritime substantive law, as it existed prior to June 5, 1920, by enacting the Jones Act on that date and thereby creating a new *statutory* cause of action for the benefit of seamen suffering personal injuries in the course of their employment (*Pacific S. S. Co. v. Peterson,* 278 U.S. 134, 73 L.Ed. 222). It is not within the lawful power of *any* court to introduce any amendment thereto by the *unauthorized* exercise of *judicial* power.

The instant the Judges constituting the division of the United States Court of Appeals for the Ninth Circuit to whom this controversy was assigned for hearing and judgment inadvertently embraced (*if* they did) the concept that they were in duty bound to protect and defend the appellant against the appellee, they disqualified themselves; and for this reason alone the judgment is null and void. Appellee had no notice, actual or constructive, that this ground of disqualification existed until the Opinion was filed. It was, therefore, not waived and is not now waived by addressing this petition for rehearing to said Judges. Appellee-petitioner has done so merely because the rules promulgated by the Judges of this Court *require* that a petition for a rehearing be so addressed.

It is conceded, as it must be, that whenever a defendant pleads *any* separate and special defense the burden is imposed upon the defendant to prove the facts constituting the defense by a preponderance of all of the evidence introduced upon issues raised by the pleadings in that respect.

This does not mean, however, that the seaman may remain mute and require the defendant to offer *affirmative* evidence in the first instance to prove that the seaman freely executed the release, that the *execution* thereof was not induced by fraud or mutual mistake, or that there was no deception or coercion, or that it was executed by the seaman with a full understanding of his rights, or that it was supported by an adequate consideration. All the releasee is required to do in order to make out a *prima facie* defense is to show that an adult seaman *did* execute the release and did at the time actually receive a consideration therefor in the form of lawful money of the United States. Well established disputable presumptions supply the remaining elements which will sustain the validity of the release and constitute *prima facie* proof thereof. The seaman is then required to offer affirmative evidence of sufficient substance to *controvert* the *prima facie* defense. If he does not, the defendant has proved the facts involved in the separate and special defense by a preponderance of the evidence. If the seaman *controverts* the *prima facie* defense by affirmative evidence, *then* the defendant must go forward with additional affirmative evidence in order to prove the ultimate fact by a preponderance of the evidence.

Therefore, the burden of proof rule is no different in a case involving a release executed by a seaman than that applied in respect of all other releases pleaded as separate and special defenses. Furthermore, when the facts of the *Garrett* case are *kept in mind,* the Supreme Court in all probability did not intend to hold otherwise. Garrett, in his testimony, *did* controvert the *prima facie* showing of the validity of the release involved in that case. At least a jury *could* have so found. The appellant here has not pointed to anything contained in the record on appeal which shows that

he *could* have controverted the *prima facie* validity of the release he executed.

Upon all of the grounds, argument and authorities hereinabove set forth, the appellee American-Hawaiian Steamship Company, a corporation, contends that it is entitled to a rehearing and that the petition therefor should be granted.

San Francisco, California
May 13, 1955

Respectfully submitted,

Lasher B. Gallagher

Attorney for American-Hawaiian Steamship Company, a corporation.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Lasher B. Gallagher

(Appendix follows)

APPENDIX

ACT EMPOWERING THE SUPREME COURT OF THE UNITED STATES TO PRESCRIBE RULES

THE ACT OF JUNE 19, 1934, CH. 651

Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. [Act of June 19, 1934, c. 651 Sections 1, 2 (48 Stat. 1064).]

RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cogni-

zable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. As amended Dec. 29, 1948, effective Oct. 20, 1949.

RULE 2. ONE FORM OF ACTION

There shall be one form of action to be known as "civil action".

* * * * * * *

RULE 6. TIME

* * * * * * *

(d) *For Motions—Affidavits.* A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

III. PLEADINGS AND MOTIONS

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

* * * * * * *

(b) *Motions and Other Papers.* (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

RULE 9. PLEADING SPECIAL MATTERS

* * * * * * *

(g) *Special Damage.* When items of special damage are claimed, they shall be specifically stated.

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

* * * * * * *

(b) *How Presented.* * * * (6) failure to state a claim upon which relief can be granted, * * *

(c) *Motion for Judgment on the Pleadings.* After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

RULE 16. PRE-TRIAL PROCEDURE; FORMULATING ISSUES

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

* * * * * * *

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

IV. PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

* * * * * * *

(b) *Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that no partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a). As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949.

(c) *Infants or Incompetent Persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

V. DEPOSITIONS AND DISCOVERY

Rule 26. Depositions Pending Action

(a) *When Depositions May Be Taken.* Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. As amended Dec. 27, 1946, effective March 19, 1948.

* * * * * * *

(d) *Use of Depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of

evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

* * * * * * *

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

* * * * * * *

(e) *Objections to Admissibility.* Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

(a) *Within the United States.* Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. As amended Dec. 27, 1946, effective March 19, 1948.

RULE 32. EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS

* * * * * * *

(c) *As to Taking of Deposition*

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

* * * * * * *

(d) *As to Completion and Return of Deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

RULE 43. EVIDENCE

(a) *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open courts, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to

which reference is herein made. The competency of a witness to testify shall be determined in like manner.

* * * * * * *

(e) *Evidence on Motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

RULE 46. EXCEPTIONS UNNECESSARY

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

RULE 56. SUMMARY JUDGMENT

* * * * * * *

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. As amended Dec. 27, 1946, effective March 19, 1948.

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 75. Record on Appeal to a Court of Appeals

(a) *Designation of Contents of Record on Appeal.* Promptly after an appeal to a court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record,

proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

* * * * * * *

(d) *Statement of Points.* No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal. As amended Dec. 27, 1946, effective March 19, 1948.

* * * * * * *

(g) *Record to be Prepared by Clerk—Necessary Parts.* The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict of the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk

may not require an additional copy as a requisite to certification. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(h) *Power of Court to Correct or Modify Record.* It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(i) *Order as to Original Papers or Exhibits.* Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper. As amended Dec. 27, 1946, effective March 19, 1948.

* * * * * * *

(o) *Rule for Transmission of Original Papers.* Whenever a court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district

court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75. The transmittal shall be within such time or extended time as is provided in Rule 73(g), except that the district court by order may fix a shorter time. The clerk shall transmit all the original papers in the file dealing with the action or the proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been disposed of, the papers shall be returned to the custody of the district court. The provisions of subdivisions (h), (j), (k), (l), (m), and (n) shall be applicable but with reference to the original papers as herein provided rather than to a copy or copies. As amended Dec. 29, 1948, effective Oct. 20, 1949.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RULE 17. PRINTING RECORDS.

* * * * * * *

3. In all cases, the clerk of this court shall prepare the record for the printer, index the same, supervise the printing, and distribute the printed copies to the judges and one or more printed copies to the counsel for the respective parties.

RULE 18. BRIEFS.

* * * * * * *

2. This brief shall contain, in order here stated—

* * * * * * *

(c) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(d) In all cases a specification of errors relied upon which shall be numbered and shall set out seperately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found.

RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

"RULE 3. MOTIONS AND MATTERS OTHER THAN TRIALS ON THE MERITS.

"(a) Motion Days:

"Mondays, while the court is in session, shall be "Motion Days" on which all calendars will be called and on which all motions, and demurrers where permitted, orders to show cause, and matters other than trials on the merits will be heard unless set for a particular day by order of the court. When notice to the adverse party is required to be given, such notice shall be for a Monday unless the court, for good cause shown, shall direct otherwise. If Monday be a national holiday, the succeeding Tuesday shall be the motion day for that week and all matters noted for such Monday shall stand for hearing on Tuesday without special order or notice.

"(b) Time for Hearing:

"When there has been an adverse appearance, a written notice of motion, or of hearing on a demurrer where per-

mitted, shall be necessary, unless otherwise provided by rule or court order.

"Any notice shall be served upon the adverse party, or his attorney, at least ten days before the time appointed for the hearing, unless the court or one of the judges thereof shall, for good cause by special order, prescribe a shorter time, and such notice shall be filed with the clerk not later than five o'clock P.M. on the Tuesday immediately preceding the Monday appointed for the hearing by the notice of motion. All motions or other matters belonging upon the Motion Day calendar, if so filed, shall be placed by the clerk upon the calendar for hearing upon the following Monday. Unless otherwise specially ordered, the clerk shall refuse to file any notice of motion, presented for filing, which sets a matter for hearing other than as above provided.

"(c) Motions Submitted:

"Motions, in general, shall be submitted and determined upon the motion papers herein referred to. Except in the event of a motion to retax costs under Rule 15(c) hereof, oral arguments shall be permitted only upon application and proper showing to the judge presiding at the hearing.

"(d) Requirements for Submission:

"There shall be served and filed with the notice of motion or other application and as a part thereof, (A) copies of all photographs and documentary evidence which the moving party intends to submit in support of the motion or other application in addition to the affidavits required or permitted by Rule 6(d) F.R.C.P., and (B) a brief, but complete, written statement of all reasons in support thereof, together with a memorandum of the points and authorities upon which the moving party will rely. Each party opposing the motion or other application shall (A), within five days after service of the notice thereof upon him, serve and file a brief, but complete, written statement of all reasons in opposition

thereto and an answering memorandum of points and authorities, or a written statement that he will not oppose said motion, and (B) not later than one day before the hearing, serve and file copies of all photographs and documentary evidence upon which he intends to rely.

"If the moving party so desires, he may, within two days after the service upon him of the points and authorities of the adverse party, file a reply memorandum.

"Any party either proposing or opposing a motion or other application who does not intend to urge or oppose the same or who intends to move for a continuance, shall immediately notify (1) opposing counsel, (2) the clerk, and (3) the secretary of the judge before whom the matter is pending, in order that the court and counsel may not be required to devote time to an immediate consideration of a matter which will not be presented.

"Failure by the moving party to file any instruments or memorandum of points and authorities provided to be filed under this rule, shall be deemed a waiver by the moving party of the pleading or motion. In the event an adverse party fails to file the instruments and memorandum of points and authorities provided to be filed under this rule, such failure shall be deemed to constitute a consent to the sustaining of said pleading or the granting of said motion or other application.

"(d)(2), Motions for Summary Judgment:

"There shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue.

"Any party opposing the motion may, not later than three days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

"In determining any motion for summary judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy except and as to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion. * * *"

(Rules of the United States District Court for the Southern District of California)

The following definitions are quoted from

WEBSTER'S NEW INTERNATIONAL DICTIONARY, Unabridged, Second Edition.

Protection: "1. Act of protecting; state or fact of being protected; as, the protection of the weak; to provide protection from harm. 2. A protecting person or things; as, the Lord is our protection; dark glasses are a protection from the sun. * * * 4. Government, oversight, or support of a protector or patron; as, small nations under British protection, * * * **Syn.**—Preservation, guard, security, safety."

Preservation: "1. Act or process of preserving, or keeping from injury or decay; state of being preserved; as preservation of life, fruit, game, etc.; a picture in good preservation. * * * 2. *Obs.* a A preservative; a safeguard. b Something preserved. **Syn.**—Safekeeping, conservation, saving. * * *"

Guard: (*verb*) "* * * 2. To protect from danger; to defend; shield; * * * 5. To furnish with proper checks or corrections; to safeguard; * * * **Syn.** Protect * * * See DEFEND."

Guard: (*noun*) "* * * **3.** Hence, state of being, or act of holding, in ward; protection, defense, as a nation's welfare is in the guard of its citizens; also, state or act of holding ward, or watch against danger; as, to keep guard. * * * **5.** One who or that which guards against injury, danger, or attack; * * * **6.** A man or body of men stationed to protect or control a person or position, a watch; a sentinel; specif., a soldier or sailor, or a number of them, on guard duty. * * *."

Security: "* * * **1.** The quality or condition of being secure. Specif.: **a** The condition of being protected or not exposed to danger; safety; also, a place of safety, * * * **b** Freedom from fear, anxiety, or care, a feeling or, formerly, an unfounded assumption, that one is secure; as, to rest in false security. * * * **c** Freedom from uncertainty or doubt; confidence, esp. well-grounded confidence; assurance. * * * **2.** That which secures. Specif.: **a** A means of protection, defense, etc.; a guard; as, to provide a security from invasion. **b** A guarantee of safety, adequate protection, certainty, etc.; a ground for believing oneself or something safe or secure. * * * **3.** *Law.* **a** Something given, deposited, or pledged, to make secure, or certain, the fulfillment of an obligation, the payment of a debt, etc.; property given or serving to render secure the enjoyment or enforcement of a right; surety; pledge; * * * **b** One who becomes surety for another, or engages himself for the performance of another's obligation; a surety. * * * **Syn.** Protection, defense, guard, shelter; guarantee."

Safety. "**1.** Condition or state of being safe; freedom from danger or hazard; exemption from hurt, injury, or loss; as, a committee of safety. **2.** *Obs.* **a** Redemption; salvation. **b** Custody. **c** A means of protection; a safeguard. **d** Act of saving; deliverance. **3.** Quality or state of being devoid of whatever exposes one to danger or harm; safeness; hence, the quality of giving confidence, justifying trust, etc.; de-

pendableness. * * * **5.** Preservation from escape; close custody. * * * **6.** A keeping of oneself or others safe, esp. from danger of accident or disease; as, safety education.

Protect: "To cover or shield from that which would injure, destroy, or detrimentally affect (or from a physical or chemical effect); to secure or preserve against attack, encroachment, harm, disintegration, etc.; to defend; to guard; as, to protect oneself, one's children, or one's eyes from glare; to protect iron from erosion, a state from its enemies, or a patent from infringement. * * * **4.** *Eng. Hist.* To act as protector for. * * * **Syn.**—Shield, preserve. See DEFEND. * * *"

Defend: "* * * **1.** To ward or fend off; to drive back or away; to repel. * * * **3.** To repel danger or harm from; to protect; to secure against attack; to maintain against force or argument; to uphold; guard; * * * to defend the absent;—sometimes with from or against; as, to defend oneself from, or against, one's enemies. **4.** Of a lawyer, to act on behalf of (an accused person). **5.** *Law.* To deny or oppose the right of the plaintiff in regard to (the suit, or the wrong charged); to controvert; to oppose or resist, as a claim at law; to contest, as a suit.—*Intransitive:* To make a defense; to fight in defense; *Law,* to enter or make a defense in an action or suit. **Syn.**—Shield, shelter, screen, secure, watch, save. * * * —DEFEND, PROTECT, GUARD, PRESERVE. * * *"